1150.

SUPREME COURT OF THE UNITED STATES.

No. 56.

W. AND D. H. DAVIESS AND AL., PLAINTIFFS IN ERROR,

vs.

JOHN H. FAIRBAIRN AND AL., HEIRS OF MARY E. FAIRBAIRN, DECEASED.

IN ERROR TO THE CIRCUIT COURT U. S. FOR KENTUCKY.

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J. & G. S. GIDEON, printers.

UNITED STATES OF AMERICA,
Eighth circuit, Kentucky district, sct:

Pleas before the Hon. Thomas B. Monroe, one of the judges of the circuit court of the United States, in and for the eighth circuit and district of Kentucky, holden at the capitol in Frankfort, at the May term thereof, A. D. eighteen hundred and forty-three.

Be it remembered, that heretofore, to wit, on the eighth day of November, A. D. eighteen hundred and forty-one, came John Doe, on the demise of John H. Fairbairn and others, by William Brown, Preston S. Loughborough, and William H. Field, esq'rs., his attorneys, into the court aforesaid, and filed the following declaration in ejectment, viz:

UNITED STATES COURT,
Eighth circuit, Kentucky district:

John Doe, a citizen of the State of Maryland, complains of Richard Roe, a citizen of the State of Kentucky, in custody, &c., for that whereas, John Huston Fairbairn, Elizabeth Ann Fairbairn, Mary H. Fairbairn, and Francis Fairbairn, only children and sole heirs of Maria Eliza Fairbairn, and all citizens of the State of Maryland, on the first day of August, 1841, in the county of Jefferson, in the State of Kentucky, and within the jurisdiction of this court, had demised to the said John Doe, a certain lot of land, tenement, and messuage, with its appertenances, and containing half an acre, situate, lying and being in the city of Louisville, county of Jefferson aforesaid, and known on the old plan of said city or town by No. 22, and by No. 91 on the new plan of said town or city, containing half an acre; to have and to hold the said lot of land, tenement, and messuage, with its appertenances, to the said John Doe and his assigns, from the said first day of August, 1841, for and during, and unto the full end and term of ten years, from thence next ensuing, and fully to be completed and ended.

By virtue of which demise, the said John Doe entered into the said tenement and parcel of land, with its appertenances, and became and was so possessed of the same, for the said term of ten years, so to him granted, and the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the 10th day of August, 1841, in the year aforesaid, with force and arms, &c., entered upon and into the said tenement, messuage, and parcel of land, with its appertenances, in which the said John Doe was so interested in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said tenement, messuage, and land, and other wrongs then and there did, against the peace and dignity of the United States of America, and of the

Commonwealth of Kentucky, and to the damage of the said John Doe five thousand dollars; and therefore he sues.

BROWN, LOUGHBOROUGH, & FIELD, *Attorneys.*

Pled de pros.
JOHN DENN,
RICHARD FENN.

To Doctor Richard Ferguson, and W. and D. H. Daviess, and Hugh Carey, and John H. Ryan.

GENTLEMEN: I am informed that you are in possession of, or claim title to, the premises, or some part thereof, in the above declaration in ejectment mentioned, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear, on the 7th day of November term, in the year 1841, before the honorable United States court for the eighth circuit and district of Kentucky, holden at Frankfort, and then and there, by a rule of said court, to cause yourselves to be made defendants in my stead, otherwise I shall suffer judgment to be entered against me by default, and you will be turned out of possession.

Given under my hand this 30th day of October, 1841.

JOHN DOE.

EIGHTH CIRCUIT, *State and district of Kentucky, to wit:*

This day Decalvess Murphy personally appeared before the undersigned, a justice of the peace of the Commonwealth of Kentucky, in and for the county of Jefferson, and made oath, that he did, on the 6th day of November, 1841, deliver to Dr. Richard Ferguson, W. Daviess, D. H. Daviess, Hugh Carey, and John H. Ryan, tenants in possession of a lot of ground, or some part of it, in the declaration mentioned, each a true copy of the said declaration, and of the notice annexed to the same, and explained to each of them, the nature and purport thereof.

Given under my hand and seal, this 6th day of November, 1841.

G. W. CHAMBERS, *J. P., J. C.*

And afterwards, to wit, at the November term of the court aforesaid, A. D. eighteen hundred and forty one, came the plaintiff, by his attorney, and it appearing to the satisfaction of the court, that the tenants in possession have been regularly served with a copy of the plaintiff's declaration, and they failing to appear and plead to the plaintiff's said action, although solemnly called, came not, but made default: It is therefore ordered, that unless they appear here on the first day of the next term of this court, and cause themselves to be made defendants, receive a declaration in a plea of trespass and ejectment, confess the lease, entry and ouster therein supposed, and plead thereto, or, on failure thereof, judgment will be entered

against the casual ejector, and the writ of habere facias possessionem will be awarded to the plaintiff.

And it is further ordered, that the surveyor of county do go on the land in controversy, on the day of next, if fair, if not, then on the next fair day, and then and there lay off and survey the same as either party may direct, having due regard to all deeds and other evidence, report all matters of fact specially, and return one fair plat and certificate thereof into the clerk's office of this court thirty days at least before the day of trial; and the marshal, or one of his deputies, is directed to attend the said surveyor, to remove force should any be offered.

Upon a true copy of the foregoing common order, the marshal made the following return, to wit:

"Executed on Richard Ferguson, W. Daviess, and D. H. Daviess, Hugh Carey, and John H. Ryan, by delivering to each one a true copy of the within.

WM. B. BLACKBURN, Jr., *M. K. D.*
Per R. B. PRICE, *D. M.*

18*th Feb'y*, 1842.

And afterwards, to wit, at the May term of the court aforesaid, in the year 1842, came the plaintiff by his attorney, and the tenants, Richard Ferguson, W. and D. H. Daviess, Hugh Carey, and John H. Ryan, by their attorney, and on his motion, the common order entered up herein against them is set aside, and they are admitted defendants in the room and stead of Richard Roe, the casual ejector; and the said tenants agree to receive a copy of the plaintiff's declaration and notice in a plea of trespass and ejectment, confess the lease, entry and ouster therein supposed, and agree to insist upon the title only upon the trial. And it is ordered, that if, upon the trial of the issue, a verdict should be given for the defendants, or the plaintiffs should not further prosecute, for any other cause than the not confessing the lease, entry and ouster therein supposed, then the lessors of the plaintiff shall pay the costs of this prosecution, if the plaintiff himself does not pay them.

And the said Richard Ferguson, W. and D. H. Daviess, Hugh Carey, and John H. Ryan, come and defend, &c., and for plea in this behalf, severally say they are not guilty of the trespass and ejectment in the plaintiff's declaration alleged against them, in manner and form as therein stated and set forth; and of this they put themselves upon the country, and the plaintiff likewise.

And afterwards, to wit, at the May term of the court aforesaid, in the year 1843, came the parties, by their attornies, and thereupon came also a jury, to wit:

A. C. Keenon,
Lemuel Stoughten,
Benjamin B. Johnson,
A. W. Lockwood,
William S. Crutched,
John P. Redding,
M. R. Stealey,
Edward S. Coleman,
Orlando Brown,
Leander J. Sharp,
Francis Hodges,
and Joseph W. Allen,

who were elected, tried, and sworn, well and truly to try the issue joined; but there not being time to go through with the trial, the jury are adjourned until to-morrow morning 9 o'clock.

And afterwards, to wit, at a subsequent day of the term aforesaid, came again the parties, by their attorneys, and the jury empannelled and sworn herein on yesterday appeared again in the jury box, but there not being time to go through with the trial, the jury are adjourned over until to-morrow morning 9 o'clock.

And afterwards, to wit, at a subsequent day of the term aforesaid, came again the parties, by their attornies, and the jury empannelled and sworn herein appeared again, and the case was further heard, but there not being time to go through with the trial, the jury are adjourned over until to-morrow morning 9 o'clock.

And at a subsequent day of the term aforesaid, came again the parties, by their attornies, and the jury empannelled and sworn herein again appeared, and the case was further heard, but there not being time to go through with the trial, the jury are adjourned over until Monday morning nine o'clock.

And at a subsequent day of the term aforesaid, came the parties aforesaid, by their attornies, and also the jury sworn in this cause, and after having heard the testimony, returned into court the following verdict:

"We of the jury find the defendants, W. and D. H. Daviess, Hugh Carey, and John H. Ryan, guilty of the trespass and ejectment in the within declaration mentioned, and assess the plaintiff's damage to one cent; and we find the defendant Richard Ferguson not guilty."

It is therefore considered by the court, that the plaintiff recover of the defendants, W. and D. H. Daviess, Hugh Carey, and John H. Ryan, his term yet to come and unexpired of, in, and to, one certain half acre lot in the city of Louisville, known on the old plan of said city by No. 22, and by No. 91 on the new plan of said city, with the appertenances thereunto belonging, and also his costs herein expended. And the writ of habere facias possessionem is awarded to the plaintiff.

And it is considered by the court, that the plaintiff take nothing by his bill against the defendant Richard Ferguson, and that he go hence and recover of the lessors of the plaintiff his costs herein expended.

And afterwards, to wit, at a subsequent day of the term aforesaid, the following bill of exceptions was filed in this case, and ordered to be enrolled.

Memorandum.

On the trial of this cause, the lessors of the plaintiff read to the jury a deed, purporting to be a deed from the trustees of Louisville to Levi Teel, marked A, No. 1, and made part hereof; "found below."

The plaintiff then read to the jury the deed from William Johnston to Daniel Henry, marked A, No. 2, and made part hereof, found below; also read to the jury the admissions marked A, No. 3, and made part hereof, in these words, to wit: "The defendant admits that Daniel Henry died intestate and left a widow, Elizabeth, and only one child, Maria Eliza, his sole heir; he admits that Elizabeth, the widow, died before the year 1820; he admits that the said Maria Eliza married Thomas H. Fairbairn when she was under the age of 21 years; he admits that the said Thomas H. Fairbairn died on the 7th day of May, 1823.

He admits that the said Maria Eliza survived her said husband, and died in the year 1828, intestate.

He admits that the following named persons are the only children and heirs of the said Maria Eliza Fairbairn, and are of the ages stated below, and are citizens of the State of Maryland:

John H. Fairbairn, of age 21st October, 1831.
Elizabeth Ann Fairbairn, of age 2d July, 1835.
Francis Fairbairn, of age 23d October, 1841.
Mary H. Fairbairn, of age 5th January, 1838.

The lessors of the plaintiff admit Thomas H. Fairbairn intermarried with the said Maria Eliza Henry prior to the year 1811, and that the said Maria Eliza Fairbairn was of the full age of twenty-one years prior to the 12th of March, 1811.

W. BROWN,
Att. for plff.
JAS. GUTHRIE,
Att. for defts.

Also read to the jury the admission marked A, No. 4, and made hereof, in these words: "The defendants admit that lot known by No. 22, and by No. 91, in the city of Louisville, at the date of the service of the declaration in this case, to wit, the 6th day of November, 1841, was occupied by five brick houses, covering the entire front on Main street, and that the two west tenements were at that time occupied by Hugh Garey and John H. Ryan, as tenants holding by lease from the defendant Richard Ferguson; that the residue of the lot had been leased by the defendant Richard Ferguson to one Edward Lynch, who had built thereon three three-story brick tenements, and that his lease was not expired, but had been assigned, with the improvements, to Smith & Keats, and one Mathew Ferguson, who had leased the tenement, being the middle of three three-story brick houses built by Lynch, to W. & D. H. Daviess, who at the time of the service of the declaration occupied it as tenants under them; and the other two tenements built by Lynch were not then occupied by any tenants under the said Smith & Keats and Mathew Ferguson, but the possession was claimed by Smith & Keats under the lease given to Lynch, and Smith & Keats had the keys; and the defendant Rich-

ard Ferguson was not by himself in the occupation of any part of the said lot, except as above stated.

The defendant Ferguson further admits that he had contracted with M. Ferguson for his interest in the lease and improvements under the Lynch lease, and M. Ferguson had made him a deed, and he had filed his bill to set aside the deed and contract for fraud.

JAMES GUTHRIE,
Atto. for deft.

And introduced the reverend Stephen Theodore Baden, who stated as in papers marked A, No. 5, and B, No. 5, and made part hereof, in these words:

"And the plaintiff introduced a witness, the Rev. Thephen Theodore Baden, who stated that he first visited Louisville in the year 1806; that, in 1807, he received a letter from Bishop Carroll, of Baltimore, requesting witness to become the agent to attend to and rent some lots in Louisville for the widow and infant daughter of Daniel Henry, deceased, who had resided in Baltimore. Witness objected; and Bishop Carroll again by letter urged this witness to take said agency as an act of benevolence and charity; and then this *depnt* did accept said agency, and rented the lot in controversy to the defendant, Dr. Richard Ferguson, in the year 1807 or 1808, for a term of three or five years, he does not recollect which; the lease was in writing, and if a counterpart was kept, of which he is not certain, it was either handed over by him to his successors in the agency, or destroyed by him with other papers when he went to Europe in 1819. This lease was made to defendant Ferguson at his request, at the time that witness *as* agent aforesaid. Saw the lot; there was on it a smith's shop, which was occupied. It was sold by witness to Dr. Ferguson at the time of the leaseing. That witness was in company with Dr. Ferguson on an adjoining lot which belonged to Dr. Ferguson when the lease was made, when the man who occupied the smith shop came behind the shop, and in front of Dr. Ferguson's house, and obeyed some call of nature; when the said Ferguson called the attention of the witness to that fact, and remarked how necessary it was to him, Ferguson, to have control of the lot in controversy. That Dr. Ferguson, after the mariage of the heir of said Henry to Mr. Fairbairn, wished this deponent to intercede with said parties to sell the said lot to said Ferguson, or to exchange it for another; which this witness declined, because he was of opinion that it would be more to the advantage of said heir to retain said lot; and this witness wrote to the family at Baltimore, advising against a sale. This witness collected the rent for said lot from Dr. Ferguson, for the widow and heir of said Henry. This witness heard that Mr. Fairbairn, husband of the heir of Daniel Henry, had sold or contracted to sell said lot to Dr. Ferguson, witness thinks for about $400. Witness understood that Ferguson had offered $300, and witness thought it was worth two

or three times as much, and that it should not be sold but for the most urgent necessity; he felt hurt that his advice was not taken, and thereupon relinquished his agency. The sale by Fairbairn to Dr. Ferguson, this deponent thinks, was before the expiration of the lease before made by this deponent, as agent of the widow and heir of Daniel Henry, and whilst Ferguson was holding the lot under said lease. Witness went to Baltimore in the fall of the year 1807, and then, for the first time, saw the said widow Henry and her daughter, who appeared to be about fifteen or sixteen years old. I read a letter now which I wrote to Mrs. Elizabeth Henry, to the care of Thomas H. Fairbairn; that letter is dated April, 1810; Mr. Fairbairn was at that time, and before, married to the said infant daughter of Daniel Henry. He further stated, that when Dr. Ferguson took the lease from him, as agent as aforesaid, he had the lot in possession, and was living in his house on the lot immediately south of this lot No. 22. When questioned whether defendant Ferguson claimed the lot, witness said he did not; and added, that Dr. Ferguson was too honest a man to have claimed the lot; and further said, nothing was said by Dr. Ferguson about his having a claim to the lot.

The counsel of the plaintiff, on the commencement of the examination of the witness, handed him a letter, and asked him to read it for the purpose of refreshing his recollection; and the witness taking the letter said it was his letter, and read aloud portions of it, saying the other part did not relate to the present purpose; and thereupon added, that what it stated was the truth. In the course of the examination the witness was asked to read the residue of the letter, for the purpose of showing that his agency embraced other lots in Louisville, and that he had received other money than for the lot in contest, and it was read; which letter, so used and treated, not as documentary evidence to the jury, but used and read by the witness as above stated, is in these words:

"BARDSTOWN, 12*th April*, 1810.

HONORED MADAM: Your favor, dated Feb'y 17th, was received in time, but I delayed giving an answer until my visit to Louisville (which I left yesterday morning) should enable me to give you fuller satisfaction; I have now in my hand $94, which I shall send by the first opportunity. As it is but seldom that friends would take the trouble to carry money in specie to your city, and the mail is not much depended on, I shall probably be obliged to apply to the Bank K—Ky., and pay 250 cents per $100 to have the money paid you in Baltimore, or send you by two different mails easter[n] bank notes in moyety, if I can obtain any. Three of your lots are in the commons, that which is contiguous to Dr. Ferguson, No. 91, formerly No. 22, is rented at $18 per annum; I have received in all $28 from him on account of the nail shop, for which he had agreed with me to pay $10. The nail maker built a house which occupies

a small portion of that ground. Mr. Johnson should not have suffered such an encroachment. There was on it a pretty large house of logs, with a shingle roof, stone chimney with two fire places, two sets of joists, &c., which totally disappeared; the logs were sold to Mr. Nelson by Mr. Johnson. This lot is very valuable, and when Dr. Ferguson offered you $300 for it, he underrated your property by half; as it is in the main street, and convenient to the landing, it must raise in value, and should not be sold without great necessity. The Doctor may plead that he pays only $18 for the rent of the lot, which is precisely the interest of $300, and that I have thereby acknowledged that this is the value of the lot, but although the grass of one half acre is worth only $18 per ann., he has no reason to conclude that the local advantage of the lot for a house and for business cannot command twice or thrice that sum; he wishes for my interfereance to cause you to make an exchange of lots; he is about purchaseing a lot of Mr. Todd, valued some years ago by Mr. Pope $400; now that lot has a small pond contiguous to or perhaps on part of it, besides it is more remote from the centre of the town, and the Doctor would fainly make me believe that there is little or no difference in the value of the two lots.

The estimation made some years ago, by Mr. Worden Pope, a judicious worthy man, and also the offer of $400 made you personally by Mr. Bullitt last year, shews that the Doctor wants to have a too advantageous bargain. I write this so frankly because I am certain you will view my communications as friendly and confidential. The lot No. 74, on Main street, on which Mr. Caperon was living when Mr. Johnson gave up the business to me, has produced a rent of $22 at $5 per month, but Mr. Caperon left it on the 3d May, 1809, and went to St. Louis, having paid only $20 to my good friend Mr. Wm. Kearney, who is acting for me, as he lives on or near the spot. Mr. Bycourt occupied the house from the 3d of May to the 2d of September, paid $18, and made a repair of $5, the house was then vacant for ten days, and is now occupied by John Humphrey for $60 per annum, of which he paid $8; he is obliged to leave the house in the same repairs in which he found it. Mr. Kearney made all these last contracts, and collected the money.

Yesterday morning Col. Johnson paid me $20 in acct., to which sum must be added $40 paid me 16 months ago, of which I sent $35 25 cents last year. As I am not invested with sufficient legal powers, he made me give him not only a receipt, as it is natural I should, but also another obligation, warranting and engageing that the payments, &c., made by him (to me or my order, should have been added) shall be good, and stand as effectual with the widow and infant daughter of said D. Henry and their representatives, &c.

I am surprised that your officers have not executed the powers of attorney in proper form; till then I cannot act efficaciously and finally with Mr. Johnson, we should not blame him for being cautious, and I have not made known that your daughter is married,

lest I should be more clogged in my opperations, I have already sent you by Mr. Smiley some reflections on the powers of attorney. Mr. Pope, clerk of the court, is so truly an honest man, that we cannot question the propriety of going through the formalities mentioned in his writing, which I transmitted to you last year. He happened to meet me yesterday at Mr. Johnson's, and the directions of the latter, which I shall enclose, were partly suggested by the former. The copy of the records transmitted to me in your last, prove that you were guardian to your daughter to the age of 16, but not to the date of her marriage; this will clog again my opperations. The letters of attorney which I returned by Mr. Smiley, should be sent back to me and amended, according to the various observations made now and formerly, to complete their validity. I could not attend to the business unless I should have Mr. Kearney empowered with me, at least as substitute, as I live at too great a distance (55 miles) from Louisville, and have already so much business on hand that much is neglected. I beg your pardon for having passed my opinion so freely. I was actuated by the sole motive to do justice to you, to your daughter and son-in-law, whom you will (words torn out here) my compliments. I shall return you also the copy of your guardianship, as it does not embrace the whole time of your daughter's single life, that with the advice of your friends the whole may be in full form.

Requesting a share in your good prayers, I am, very respectfully, dear madam, your obedient humble servant,

STEPHEN THEODORE BADEN.

P. S. 1st. The lot No. 127 has not been deeded as yet; when I shall have received the powers of attorney, I shall apply to the trustees of the town for its being executed.

2d. By an act of our assembly, 10th February, 1798, the formalities for powers of attorney were determined. You will please to remember to have them duly certified by the presiding magistrate of the court or mayor of the city.

3d. Upon better reflection, I see no necessity to enclose the copy of your guardianship to the age of 16, nor of your being appointed since your daughter is married, and the deficiency must be supplied by her husband. S. T. B.

24th April: Last week I sent by Mr. Thomas Hynes $50 to be paid for you to (torn out) nair, I paid 100 cents for the premium. I could not prevail on him to take the remainder, which I (torn out) as soon as possible. The misfortune is that it is cut money, which I must exchange.

To Mrs. Elizabeth Henry, care of Mr. Thomas H. Fairbairn, Liberty street, Baltimore.

Witness, on cross examination by defendant's counsel, stated that he did not recollect what Johnson was spoken of in the letter, there was so many of the name; nor could he recollect the state-

ments therein made as to the agency of Johnson, or whether Johnson had acted as agent or not, and recollected nothing about lot No. 74; he was seventy-five years of age, and his memory had of course failed. He frequently said he could not recollect with certainty, especially as to dates: and plaintiff also introduced Joseph T. Tunstall, who stated as in paper marked A, No. 6, made part hereof in these words—

"The plaintiff also introduced a witness, Joseph T. Tunstall, who stated that he had known the lot in controversy a long time, and that Dr. Richard Ferguson had been in possession of it for twenty-five years or more.

And then offered as the deed of Mrs. Elizabeth Henry and Thomas H. Fairbairn, and not as the deed of Mrs. Maria Eliza Fairbairn, the deed marked A, No. 7, and made part hereof, (found below,) which deed the court admitted to be read to the jury, subject to the legal questions as to the effect thereof, as to the title of Mrs. M. Fairbairn; and this being all the testimony on the part of the plaintiff, the defendant moved the court to instruct the jury that the deed, purporting to be a conveyance from Mrs. Elizabeth Henry and Thomas H. Fairbairn and Maria his wife, passed their whole estate to the defendant Richard Ferguson, and that in consequence thereof the lessors of the plaintiff had shown no title, and the law upon the evidence is for the defendants; but the court overruled the instructions.

The defendants then introduced William Lampton, a witness, who stated in paper marked A, No. 8, and made part hereof, in the words following:

The evidence of William Lampton.

The defendants introduced William Lampton, who testified that he moved to Louisville, in the year 1803, from the county of Jefferson, about seven miles from town, and resided on the north side of Main street, on Beard's lot, on the square between 1st and 2d cross streets, and knew this lot No. 22 on the old plan, and No. 91 on the new plan; there was no one in possession of it in that year, nor any improvement on it; it was on the south side of Main street, between 2d and 3d streets, and was the second lot west from the corner of Main and Second cross streets; that, in the year 1804, a Mr. John Stewart, the father of James Willis and Isaac Stewart, of Louisville, who was a gunsmith, came to Louisville and boarded at his house, and carried on his business in a small house which was on a lot, which he owned, on the north side of Main street, between First and Brook streets, in the square immediately above the square in which he lived; that Stewart built a house on lot No. 22 by the old plan, and No. 91 by the new plan of Louisville, of hewed logs, in the summer of 1804. The house was 20 feet by 30 feet, and stood about the middle of the lot. The house was raised to the square, and he helped Stewart to raise the house, and who told him the lot was his; that Stewart took sick in September or

October of the year 1804, and went home to near Jeffersontown, where his family resided, and departed this life some time in the fall of that year, and witness never saw him again; that the house was finished by some one, but by whom he did not know, and some one lived in the house, but whom he did not know, nor how long it was occupied, nor when the house was removed, nor by whom; but it was removed, and was not on the lot in 1806; that Dr. Ferguson owned the lot immediately south of this lot No. 22, and, in 1806, enclosed his lot with a fence with rails which he got from Doct. Elisha Hall. He knows the rails were got in 1806, because he got some at the same time, and was sued for them by Mrs. Collins in the fall of 1806. He stated that Dr. Ferguson built on the Market street lot, south of the lot in controversy, a brick house, in 1807, and being the same in which he now lives; and, in December of that year, witness put a stone cill or cills in the doors of the doctor's house, and then the lot was inclosed on the east side by the same fence which inclosed the lot of the doctor's on which his house was built; and he plastered the doctor's house in the spring of the year 1808, at which time there were shrubbery and trees (on the lot No. 22) in a flourishing condition and growing finely, and looked as if they had been planted the preceeding years. He stated that, in 1808, the doctor hired his black man to repair or remake the fence on the west side of lot No. 22, which was then run through a pond which was on the west side of the lot, and around which a previous fence had been made, except about one-third of the west line, where there was a deep pond; that a man by the name of Martin built a blacksmith shop on the front of the lot No. 22, but he did not know under whom he had built it. It was built in 1807 or 1808, and remained there a year or two. That he did not recollect that he had ever heard Dr. Ferguson say, at that early day, how he claimed the lot, or how he got it. He (witness) stated that Dr. Ferguson built a brick house on lot in contest, on Main street, in 1814, and had, ever since he first enclosed it, used it and occupied it as owner and proprietor, and witness considered it was his lot. In the spring, say May, 1808, when he got my negro man to repair his fence, he spoke of the lot No. 22, in contest, as his lot, and then the shrubbery and trees thereon were growing flourishingly. The repairs were made of the fence on the lot in contest; the trees were cherry trees. Witness stated that the fence, on the east side of the lot, run from Market street (rail fence) all along the line of Dr. Ferguson's lot, on which he lived, and along the eastern line of lot in contest, to Main street, and that the fence on the front of lot in contest, on Main street, was a post and rail fence; and he believes there was a fence on the west side of the lot in contest about two-thirds of the way, and the balance was a deep pond, and a ridge had been just raised through the pond to put a fence on the balance of the west line. My negro man put this part of the fence there by my instructions;

this was in May, 1808. I know it was in May, 1808, from the charge on my books for the services of my negro man in 1808; and that it was in May, from seeing in the books of Dr. Ferguson that he credited me for his services in 1808. And this was all the evidence on the part of the defendants.

The defendants then moved the five instructions to the jury, as follows:

1st. The defendants move the court to instruct the jury that the deed for the lot in contest from William Johnson to Daniel Henry, the remote ancestors of the lessors of the plaintiff, did not vest a legal title or seizen of the lot in said Henry, and there being no evidence of said Henry's having been possessed of the lot, claiming it as his own, no title or seizen of said lot descended from the said Henry to his daughter, the mother of the lessors of the plaintiff.

2d. That if they believe from the evidence, that the defendant Ferguson was in the possession of the lot, claiming it as his own, and under a mistake as to the title of Mrs. E. Henry and her daughter, agreed to pay rent, and then took the conveyance given in evidence in this cause, under the like mistake as to the title, the agreement to pay rent, and the taking the deed under these circumstances, did not give a seizen in law or in fact of the lot in contest to Mrs. Fairbairn, and under this state of case, no right of entry accrued to Mrs. Fairbairn on the death of her husband, and none descended to the lessors of the plaintiff from her, and the law is for the defendants.

3d. That unless they find from the evidence, that the lot in contest was the inheritance of the wife of Thomas H. Fairbairn, the mother of the lessors of the plaintiffs, during her coverture with the said Thomas H. Fairbairn, the lessors of the plaintiff cannot recover in this action.

4th. The lessors of the plaintiff have no right of entry to enable them to sustain this action.

5th. The defendants also moved the court to instruct the jury, that if they believe from the evidence Daniel Henry had no legal title from the Commonwealth, and had no possession of the lot, claiming it as his own in his life, and that Mrs. Fairbairn was an infant when the defendant Ferguson accepted the lease, and a *feme covert* when he accepted the deed from Mrs. Elizabeth Henry and Thomas H. Fairbairn, that whilst an infant and *feme covert*, she could not acquire an estate by disseizen.

The court refused to give to the jury the instructions marked Nos. 2, 4, and 5, or either of them, and refused to give the instructions No. 1 and 3, as moved, but gave to the jury these instructions, instead of defendants' instructions No. 1.

The court instruct the jury, that the deed for the lot in contest, from William Johnson to Daniel Henry, the remote ancestors of the lessors of the plaintiff, did not of itself vest a legal title or seizen of the lot in contest in the said Henry, and that there is no

evidence that the said Henry was seized of the lot, or possessed of it, claiming it as his own. Yet if it be found, as supposed in the 2d instruction given in substitution of those moved on behalf of the plaintiff, that the widow and heiress of Daniel Henry, claiming as his representative, under the deed of Johnson to him, or otherwise, as the inheritance of the heiress, by their agent, leased or rented the lot to Dr. Ferguson, and the widow and heiress, or her after married husband, received the rent in her right, she, the heiress Maria, was possessed and seized of the property as of her inheritance, and her husband having afterwards claimed the property as her, his wife's, inheritance, and so conveyed his estate of curtesy to the defendant Ferguson, as supposed in that instruction; the wife Maria had the reversion in fee, and at the expiration of the estate of curtesy, upon the demise of her husband, she had the right of entry on the land, which descended to her heirs.

Instead of defendants' instructions No. 3, the court instruct the jury, that unless they find from the evidence, that the lot in contest was the inheritance of Maria E. Fairbairn, the mother of the lessors of the plaintiff, or that she was seized thereof, as of her inheritance during her coverture with Thomas H. Fairbairn, the lessors of the plaintiff cannot recover in this action; but if the facts be found as supposed in the 2d instruction given by the court, in substitution of those moved by the plaintiff, then she, Maria E. Fairbairn, was possessed and seized of the property as her inheritance during her coverture; she had the *wright* to entry on the expiration of the estate of curtesy, conveyed by her husband to Ferguson; on the death of her husband, this right descended to the lessors of the plaintiff, and they may recover.

And in substitution of a number of instructions moved by the plaintiff, the court gave to the jury these instructions.

Instead of the plaintiff's instruction No. 1, the court instructed the jury, that the deed of conveyance by Thomas H. Fairbairn, &c., of 12th March, 1811, to the defendant Dr. Richard Ferguson, whereof a copy was read in evidence by the plaintiff, was not in law the deed of the *feme covert* Maria E. Fairbairn, is not her deed of conveyance for any purpose whatever, and passed from her to Dr. Ferguson no estate whatever in the lot of land in controversy.

Instead of the plaintiff's instruction No. 2, and all following, the court instruct the jury, that if it be found on the evidence that the defendant Dr. Ferguson was in possession of the lot of ground in controversy, and, whilst so in possession, applied to, or otherwise negotiated with the witness acting as the agent of the widow and infant heirs of Daniel Henry, claiming the property under the deed from William Johnson to the said Daniel Henry, of the second August, 1785, or otherwise as the inheritance of the heiress Maria, and without alledgeing, or the mention of any claim to the property, or to the possession thereof, or on the improvements upon it, but purchasing from the agent the only house upon the lot, to be by

him, the defendant, removed off the premises, took a lease of the ground, or rented it of him, the agent, so acting for a term of years, and thenceforth held the possession under the lease, paying the rent; and afterwards, whilst so holding, without setting up any claim to the property, proposed to purchase it of his lessors, and on the marriage of the heiress, and her arrival at full age, he then, whilst still in possession, without having set up any claim of right, made the purchase and received the deed of conveyance from Thomas H. Fairbairn, &c., and continued in possession under it. Then, and on the other facts admitted by the parties on this trial, the defendant Ferguson had and held an estate of curtesy, which could not endure beyond the life of Thomas H. Fairbairn, reversion in fee in his wife Maria, and on his, the husband's, death, a right of entry accrued to widow Maria, which on her death descended to her heirs, the lessors of the plaintiff. This right of entry, neither the defendant Ferguson, nor either of his co-tenants in possession, holding under him as tenants for years, can controvert on any evidence now in this cause. It is not on the facts agreed tolled by any adversary possession, and the action is not barred by any statute of limitation.

The court had in like manner, on behalf of the plaintiff, instructed the jury: If it be found that the defendant Ferguson was not in possession of any part of the lot in controversy, as supposed in the above instruction, but obtained the possession from the agent of the widow of Daniel Henry, and the heiress Maria, under the lease from, or agreement with him, renting the premises, then it is immaterial whether, in the negotiation for the lease or the renting, be asserted or pretended any right or claim in the property in himself or not; and on the other facts supposed in the above instructions, the same consequence follows as on all the facts there supposed.

The defendant Ferguson had moved the court to instruct the jury to find for him on the ground that he was not in possession of any part of the lot in controversy at the commencement of this suit, and it having been understood that the possession spoken of by the witness Tunstall, was the possession of Ferguson, by himself and tenants, and that the agreement as to the possession showed the manner of his possession at the commencement of this suit, the instruction was given accordingly.

To which several decisions of the court, overruling and refusing to give the jury the several instructions as asked by the defendants, and giving to the jury the instructions in substitution of them, and in substitution of those moved on the part of the plaintiffs, the defendants excepted, and the exceptions being allowed, the same signed and sealed, and ordered to be enrolled.

THOS. B. MONROE, [L. S.]

Deeds referred to in the foregoing bill of exceptions.

A, No. 1.

This indenture, made the 18th day of August, in the year of our Lord 1783, between William Pope, James Sullivan, Marcham Brashear, William Oldham, James Patton, and George Wilson, gentlemen, trustees of the town of Louisville, of the one part, and Levi Teal, of the county of Jefferson, and State of Kentucky, of the other: Whereas, by a late act of Assembly, for establishing the town of Louisville, at the falls of Ohio, one thousand acres of land, the forfeited property of a certain John Connelly, was vested in John Todd, jr., Stephen Trigg, George Slaughter, John Floyd, William Pope, George Merriwether, Andrew Hynes, James Sullivan, and Marcham Brasheare, gentlemen, as trustees to the said town, to be by them, or any four of them, laid off, disposed of, and conveyed as by the said act of Assemby directed, and the land being now laid off accordingly, this indenture witnesseth, that for and in consideration of the sum of three shillings, current money of Virginia, to the said trustees in hand paid, by the said Levi Teal, the receipt whereof they do hereby acknowledge, and thereof do release, acquit, and discharge the said Levi Teal, heirs, executors, and administrators, by these presents, they, the said trustees, have granted, bargained, sold, aliened, and confirmed, and by these presents do grant, bargain, sell, alien, and confirm, unto the said Levi Teal, heirs and assignees forever, a lot of land in the said town of Louisville, No. 22, and all the appurtenances thereby belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof: to have and to hold the said lot of land hereby conveyed to the said Levi Teal, heirs, and assigns forever, to the only proper use and behoof of him, the said Levi Teal, and of his heirs and assigns forever; and the said trustees do covenant and agree, to and with the said Levi Teal, heirs and assigns, that the said lot hereby bargained and sold, shall be free and clear from all manner of incumbrances whatever, subject only to the conditions expressed in the aforesaid act of Assembly; and also the said trustees do hereby warrant and defend the aforesaid lot of land, from the claim of all and every person claiming by, from, or under them, or any of them.

In witness whereof, the said trustees have hereunto set their hands and seals, the day and year first above written.

W. POPE, [L. S.]
MARCHAM BRASHEARE, [L. S.]
JAMES PATTON, [L. S.]
JAMES SULLIVAN, [L. S.]
WILL. OLDHAM, [L. S.]
GEORGE WILSON. [L. S.]

Sealed and delivered in presence of—
MATH. PRICE.

JEFFERSON, *sct:*

At a court held for Jefferson county, September 5th, 1783, the foregoing indenture, from the trustees of the town of Louisville to Levi Teal, was acknowledged and admitted to record.

Teste: WILL. JOHNSTON, *C. J. C.*

I, Curran Pope, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that the foregoing is truly copied from the records in my office.

Teste: CURRAN POPE, *Clk.*

A, No. 2.

This indenture, made this 2d day of August, 1785, between William Johnston, of the county of Jefferson, and State of Virginia, of the one part, and Daniel Henry, merchant, from Maryland, of the other part, witnesseth: That the said Johnston, for and in consideration of fifteen pounds to him in hand paid, the receipt whereof he doth hereby acknowledge, and thereof doth release and discharge the said Daniel Henry; he, the said Johnston, hath this day granted, bargained, sold, aliened, and confirmed, and by these presents doth grant, bargain, sell, alien, and confirm, unto the said Daniel Henry, his heirs, and assigns, forever, a lot of land in the town of Louisville, at the falls of the Ohio, No. 22, in the old plan thereof which was originally drawn by Levi Theal, and by him assigned [to] said Johnston, containing, by estimation, one-half acre, and all the appurtenances thereunto belonging, or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof: to have and to hold the lot of ground hereby conveyed unto the said Daniel Henry, his heirs and assigns forever, to their only proper use and behoof of him the said Henry, and of his heirs and assigns forever; and the said William Johnston doth covenant and agree, to and with the said Henry, his heirs, and assigns, that the lot of land shall be free and clear from all manner of incumbrances whatever, subject only to the conditions expressed in the act of Assembly for establishing the said town; and also the said Johnston doth hereby warrant and defend the aforesaid lot of ground from the claim of all and every person or persons whatsoever, claiming, or to claim by, from, or under him, his heirs, or assigns, them, or any of them, and from the claim of any other person whatever, excepting the conditions of the aforesaid act of Assembly.

In witness whereof, the said Johnston doth hereto set his hand and seal, the date above.

WILLIAM JOHNSTON. [L. s.]

Sealed and delivered in presence of—

———.

At a court held for Jefferson county, August 2d, 1785, the foregoing deed, from William Johnston to Daniel Henry, was acknowledged in open court and admitted to record.

Teste: WILL. JOHNSTON, *C. J. C.*

I, Curran Pope, clerk of the county court of Jefferson county, in the State of Kentucky, certify that the foregoing is truly copied from the records in my office.

Teste: CURRAN POPE, *Clk.*

A, No. 7.

This indenture, made this 12th day of March, in the year of our Lord 1811, between Elizabeth Henry, Thomas H. Fairbairn and Maria his wife, (daughter and heiress of Daniel Henry, deceased,) of the city of Baltimore, in the State of Maryland, of the one part, and Dr. Richard Ferguson, of the town of Louisville, in the county of Jefferson and State of Kentucky, of the other part, witnesseth: That the said Elizabeth Henry, and Thomas H. Fairbairn and Maria his wife, for and in consideration of the sum of eight hundred dollars, current money of the United States of America, to the said Thomas H. Fairbairn in hand paid, at and before the execution of these presents, the receipt whereof is hereby acknowledged, the said Elizabeth Henry, as tenant in dower, hath aliened, released, and confirmed, and by these presents doth alien, release, and confirm, and the said Thomas H. Fairbairn as tenant by the curtesy, and the said Maria his wife, as tenant in fee simple, have granted, bargained, sold, conveyed, released, and confirmed, and by these presents doth grant, bargain, sell, release, convey, and confirm, unto the said Richard Ferguson, his heirs and assigns, forever, a certain lot of land, with all the appurtenances, situate, lying, and being in the town of Louisville aforesaid, and known on the plan or map thereof by the number ninety-one, (91,) containing half an acre, be the same more or less, on Main street, adjoining the northwardly side of the half acre lot whereon the said Ferguson now lives, and between the same and Main street: To have and to hold the said half acre lot number ninety-one, with all the appurtenances, unto the said Richard Ferguson, his heirs and assigns, to his and their only proper use and behoof forever. And the said Thomas H. Fairbairn and Maria his wife do covenant and agree, to and with the said Richard Ferguson, and his heirs and assigns, that they, the said Thomas and Maria, will, and their heirs, executors, and administrators, shall, warrant and forever defend the said lot of land numbered ninety-one, with all the appurtenances, unto the said Richard Ferguson, his heirs and assigns, against all and every person or persons whatsoever lawfully claiming or to claim the same.

In witness whereof, the said Elizabeth Henry, Thomas H. Fairbairn, and Maria his wife, have hereto set their hands and seals, on the day and year first written.

ELIZABETH HENRY, [L. S.]
THOMAS H. FAIRBAIRN, [L. S.]
MARIA ELIZA FAIRBAIRN. [L. S.]

Signed, sealed, and delivered, in presence of—
EDW'D JOHNSTON,
JNO. HARGROVE,
HENRY PAYSON,
CUTH. BULLITT,
THOMAS LESTER.

BALTIMORE COUNTY, STATE OF MARYLAND, *sct:*

Be it known and remembered, that on this twelfth day of March, eighteen hundred and eleven, Elizabeth Henry, and Thomas H. Fairbairn and Maria his wife, parties to the within and foregoing deed of conveyance to Dr. Richard Ferguson, come in their proper person before me, Edward Johnston, mayor of the city of Baltimore, in the State aforesaid, and signed, sealed, and delivered said deed of conveyance, as and for their voluntary act and deed; and the said Maria, being privately examined by me out of the presence and hearing of her said husband, did, of her own free will and consent, again consent to and acknowledge the said deed of conveyance as and for her act and deed, the same being shown and explained to her; and also relinquished and released all her right, title, interest, and estate, and fee, of, in, and to the lot of land No. 91, with all the appurtenances by the said deed conveyed, or intended to be conveyed.

In testimony whereof, I have hereto set my hand, and caused [L. S.] the corporate seal of the city of Baltimore to be hereunto affixed, the day and year above written.

EDW'D JOHNSON,
Mayor of the city of Baltimore.

May 20th, 1811.

JEFFERSON COUNTY, *sct:*

This day the within indenture of bargain and sale was received by me in my office, as clerk of the county court of said county; and being duly certified and authenticated, I have thereupon, at the instance of Dr. Richard Ferguson, recorded the said deed and certificate in my office.

WORDEN POPE.

I, Curran Pope, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that the foregoing is truly copied from the records in my office.

Attest: CURRAN POPE, *Clk. J. C.*

Be it remembered, that on the trial of this cause the plaintiff read in evidence to the jury, in connexion with the deed from the trustees of Louisville, and the deed from Johnston to Daniel Henry, set out in defendants' bill of exceptions, a paper purporting to be a copy of a deed from Levi Theal to William Johnston, with the certificates of its proof, and registration thereunder written, all sub-

ject to objections to be afterwards made by the defendants to their competency; and after the evidence stated in defendants' bill of exceptions had been given, the counsel for defendants made their objections to the said deed from Theal to Johnston, and moved the court to exclude it, and on argument thereof, the court excluded the said paper as evidence from the jury. The paper so excluded, and which purports to be the proof of the execution of the original and its registration, is in these words:

"I, Levi Theal, for value received, do hereby assign over unto William Johnston, senr., his heirs or assigns, all the right, title, claim, property or demand, that I now have or ever may have, unto a lot of land No. 22 old plan, No. 91 new plan, of Louisville, from me, my heirs, &c., forever; and I promise at any time or times, and at all times hereafter, further to do or cause to be done all such other acts or deeds, as shall be necessary for the full and absolute conveyance of said lot to said Johnston, his heirs and assigns, from me, my heirs, &c., forever.

In witness whereof I have hereto set my hand and seal this 5th October, 1784.

LEVI THEAL, [L. S.]

Teste: SAM. WELLS,
JNO. MOORE,

At a court held for Jefferson county, Oct. 5th, 1784, the foregoing assignment from Levi Theal to William Johnston was fully proven and order[ed] to record.

Teste: WILL. JOHNSTON, *C. J. C.*

I, Curran Pope, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that the foregoing is truly copied from the records in my office.

Attest: CURRAN POPE, *Clk.*

To which decision of the court the plaintiff by his counsel excepted, and his exception being allowed, this his bill of exceptions is now signed and sealed, and ordered to be recorded.

THOMAS. B. MONROE, [L. S.]

UNITED STATES OF AMERICA,
Eighth circuit Kentucky district, sct:

I, John H. Hanna, clerk of the circuit court of the United States in and for the district aforesaid, do hereby certify that the preceeding twenty-nine pages (this included) contain a true and complete transcript of the record and proceedings had in the cause mentioned in the caption thereof.

In testimony whereof I have hereunto subscribed my name and affixed the impress of the seal of said court, this third day of [L. S.] August, A. D. one thousand eight hundred and forty-three, and in the sixty-eighth year of our independence.

Att: JOHN H. HANNA, *C. C. C. K. D.*

Allowed by Thos. B. Monroe, J. U. S. Dt. Ky.

UNITED STATES OF AMERICA:

The President of the United States to the judges of the eighth [L. S.] circuit court of the United States of America holden in and for the Kentucky district, greeting:

That because in the record and proceedings, and also in rendering a judgment in a suit before them, between John Doe on the demise of John H. Fairbairn, Elizabeth Ann Fairbairn, Mary H. Fairbairn and Francis Fairbairn, children and heirs of Maria Eliza Fairbairn, deceased, plaintiff, and W. & D. H. Daviess, Hugh Carey and John H. Ryan, defendants, in an action of ejectment, manifest error hath intervened to the great damage of the said W. & D. H. Daviess, Hugh Carey and John H. Ryan, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if a judgment thereof be given, then under your seal you distinctly and openly send the record and proceedings in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and associate justices of the Supreme Court of the United States on the second Monday in January next, at the city of Washington, the present seat of the National Government, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court at Washington aforesaid, the 22d day of May, A. D. 1843, and of the independence of the United States the sixty-seventh.

Att: JOHN H. HANNA, *C. C. C. K. D.*

To John H. Fairbairn, Elizabeth A. Fairbairn, Mary H. Fairbairn and Francis Fairbairn, children and heirs of Maria Eliza Fairbairn, deceased, of the State of Maryland, and lessors of John Doe, greeting: whereas, a writ of error has been issued by the clerk of the 8th circuit court of the United States of America, in and for the district of Kentucky, by W. & D. H. Daviess, Hugh Carey and John H. Ryan, returnable to the Supreme Court of the United States at the city of Washington, the present seat of the National Government, on the second Monday in January next, to reverse a judgment entered up by said circuit court in a certain action in which the matter in dispute exceeded the value or sum of two thousand dollars, exclusive of costs, and which the said John Doe, on the demise of said John H. Fairbairn, Elizabeth A. Fairbairn, Mary H. Fairbairn and Francis Fairbairn was plaintiff, and the said W. & D. H. Daviess, Carey and Ryan were defendants.

These therefore are to cite and command you that you be and

appear in the said Supreme Court at Washington, on the day aforesaid, then and there to hear the errors assigned for the reversal of the said judgment, and to be heard if any thing you have to say upon the said writ of error.

Witness my hand as one of the judges of the said circuit court, this 22d day of May, 1843, and of the independence of the United States the 67th year.

THOS. B. MONROE, *J. U. S. Dt. Ky.*

Filed 26th Sept., 1843.

1161.

SUPREME COURT OF THE UNITED STATES.

No. 58.

THE STATE OF MARYLAND, FOR THE USE OF WASHINGTON COUNTY, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS FOR THE WESTERN SHORE OF MARYLAND.

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J. & G. S. Gideon, Printers.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the judges of the court of appeals for the Western Shore of Maryland, greeting:

[L. S.] Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you, or some of you, between the State of Maryland, for the use of Washington county, plaintiff in error, and the President and Directors of the Baltimore and Ohio Railroad Company defendants in error, a manifest error hath happened, to the great damage of the said State of Maryland, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in January next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Roger B. Taney, Chief Justice of our Supreme Court, the second Monday in January, in the year of our Lord one thousand eight hundred and forty-three.

Issued 1 May, 1843.

THO. SPICER, *Clk. circ't c't.*

THE UNITED STATES OF AMERICA:

To the President and Directors of the Baltimore and Ohio Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the second Monday in January next, pursuant to a writ of error filed in the clerk's office of the court of appeals for the Western Shore of Maryland, wherein the State of Maryland, for the use of Washington county, is plaintiff in error, and the President and Directors of the Baltimore and Ohio Railroad Company are defendants in error, to shew cause, if any there be, why the judgment rendered against the said State of Maryland, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal, this nineteenth day of May, 1843.

R. B. TANEY. [SEAL.]

I acknowledge notice of the above citation.

JNO. H. B. LATROBE,
For B. & O. R. R. Co.

MARYLAND, *sct:*

At a court of appeals of the State of Maryland, one of the United States of America, begun and held for the Western Shore of the said State on the first Monday of December, in the year of our Lord one thousand eight hundred and forty-two, being the fifth day of the same month, and the sixty-seventh year of the independence of the said United States:

Present: The honorable John Buchanan, chief judge.
" " John Stephen,
" " Stevenson Archer,
" " Thomas B. Dorsey,
" " Ezekiel F. Chambers,
" " Ara Spence,
} Judges.

Richard W. Gill, clerk.

Among other proceedings, were the following, to wit:

Be it remembered that now, here, on the second Monday in June, being the thirteenth day of the said month, in the year of our Lord one thousand eight hundred and forty-two, the chief judge and associate judges of the fifth judicial district of Maryland, in pursuance of the directions of the act of Assembly in such case made and provided, transmit to the court of appeals here the record of proceedings of a plea which was lately depending before them in the county court of Frederick county, between the State of Maryland, at the instance, and for the use of Washington county, plaintiff, and the Baltimore and Ohio Railroad Company, defendants, and wherein the said county court gave judgment for the said the Baltimore and Ohio Railroad Company against the said the State of Maryland, at, &c.; and from which said judgment the said the State of Maryland, at, &c. appealed to the court of appeals here; the tenor of which said record of proceedings is in form following, to wit:

STATE OF MARYLAND, *Frederick county, to wit:*

At a county court begun and held at the court-house in Frederick town, in and for said county, on the fourth Monday and twenty-second day of February, in the year of our Lord one thousand eight hundred and forty-one—

Present: The Hon. John Buchanan, esq'r, chief judge; Abraham Shriver and Thos. Buchanan, esquires, associate judges; Henry Houck, esq'r, sheriff; and Henry Schley, clerk.

In the record of proceedings of the said court, amongst others, were the following, to wit:

THE STATE OF MARYLAND, use of Wash'ton county,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.
} Action of debt $1,000,000.

Be it remembered that, heretofore, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and

forty-one, the said State, by William Price and Jervis Spencer, esquires, its attornies, prosecuted and sued forth, out of the county court here, the writ of subpœna of the State of Maryland of capias ad respondendum, directed to the sheriff of Frederick county, in the words and of the tenor following, to wit:

FREDERICK COUNTY, *to wit:*

The State of Maryland to the sheriff of Frederick county, greeting:

You are hereby commanded to summon the Baltimore and Ohio Railroad Company, if they shall be found in your bailiwick, and them safe keep, so that you have their bodies before the judges of the next county court to be held at the court-house in Frederick town, in and for the said county, on the fourth Monday of February instant, to answer unto the State of Maryland, in a plea that they render to the said State the sum of one million of dollars, current money, which to the said State they owe, and from the said State they unjustly detain, and so forth. Hereof fail not at your peril, and have you then and there this writ.

Witness the honorable John Buchanan, esq., chief judge of the said court, the 26th day of October, in the year of our Lord 1840.

Issued the 1st day of February, 1841.

HENRY SCHLEY, *Clk.*

(PRICE & SPENCER.)

And the aforesaid State, by its attornies aforesaid, on the day of prosecuting and suing forth out of the aforesaid writ of subpœna, declared against the said Baltimore and Ohio Railroad Company in the plea aforesaid, in form following, to wit:

STATE OF MARYLAND, *Frederick county, to wit:*

The Baltimore and Ohio Railroad Company was summoned to answer unto the State of Maryland, (for the use of Washington county,) in a plea that the said company rendered unto the said State the sum of one million of dollars, current money, which to the State it owes, and from the said State unjustly detains, &c. And whereupon the said State, by William Price and Jervis Spencer, its attornies, says that, heretofore, at a session of the General Assembly of Maryland, begun and holden at the city of Annapolis, on the last Monday of December, being the twenty-eighth day of the said month, in the year of our Lord one thousand eight hundred and thirty-five, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and thirty-six, an act was passed, entitled "An act for the promotion of internal improvement, by which, *amongt* other things, it was provided and enacted, that if the Chesapeake and Ohio Canal Company, and the Baltimore and Ohio Railroad Company, in general meeting of said corporations respectively assembled, should approve, assent, and agree, to the several provisions of that act, so far as they were applicable to the said corporations, respectively, and should severally commu-

nicate said approval, assent, and agreement, under their corporate seals and the signatures of their presidents, to the Governor of this State, on or before the first day of August then next, the treasurer of the Western Shore of Maryland should subscribe to the capital stock of each of said corporations the sum of three millions of dollars, and pay for the same in the manner, and upon the conditions thereinafter mentioned. And it was further provided and enacted in and by the said act, that the said treasurer should be, and he was thereby, authorized and directed to pay, from time to time, upon the requisition of the president and directors of the said companies respectively, after six months notice, not exceeding one million of dollars to each of said companies in any year; in the whole not more than three millions of dollars to each of them.

And it was further provided and enacted, in and by the said act, that the said Treasurer should not make any payment aforesaid for subscription to the stock of the Baltimore and Ohio Railroad Company until after a majority of the directors, appointed therein on behalf of this State, should have certified to the treasurer in writing, supported by the oath or affirmation of a majority of said directors, that they sincerely believed in their certificate and statement, that with the subscription by that act authorised to be made to said company's stock, and with the subscription which the city of Baltimore might have made by virtue of an act passed at December sessions of the year eighteen hundred and thirty-five of the said Assembly, or that independantly of any subscription by any other public authority than the city of Baltimore as aforesaid, and of the cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future profits and debts due by the company on interest, the said railroad company in their opinion had funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown, and Boonsborough, to its then present tract near to Harper's Ferry; and it was thereby declared to be, and made the duty of the said company to, and that they should so, locate and construct the said road so as to pass through each of said places, which said provisions were made, subject, nevertheless, to this proviso, in the said act enacted and contained, that is to say: Provided, that if the said Baltimore and Ohio Railroad Company should not locate the said road in the manner provided for in that act, then and in that case they shall forfeit one million of dollars to the State of Maryland, for the use of Washington county, as by the said act of assembly *now* fully appears.

And the said State of Maryland in fact says, that the said Chesapeake and Ohio Canal Company and the said Baltimore and Ohio Railroad Company did, in general meeting of the said corporations respectively assembled, approve, assent and agree to the several provisions of the said act, so far as they were applicable to the said corporations respectively, and did severally communicate said approval, assent and agreement, under their corporate seals and the

signatures of the presidents, to the Governor of this State, before the said first day of August then next, that is to say: the said Chesapeake and Ohio Canal Company in a general meeting of said corporation assembled on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and thirty-six, at the city of Washington, did approve, assent and agree to the several provisions of the said act so far as they were applicable to the said Chesapeake and Ohio Canal Company, and did afterwards, and before the said first day of August, to wit, on the twenty-ninth day of July, in the year last aforesaid, communicate the said approval, assent and agreement, under its corporate seal and the signature of its president, to the Governor of this State. And the said Baltimore and Ohio Railroad Company in general meeting of the said corporation assembled in the city of Baltimore, on the eighteenth day of July, in the year last aforesaid, did approve, assent and agree to the several provisions of the said act, so far as they were applicable to the said Baltimore and Ohio Railroad Company, and did afterwards, and before the said first day of August, to wit, on the twenty-sixth day of July, in the year last aforesaid, communicate its said approval, assent and agreement, under its corporate seal and the signature of its president, to the Governor of this State. And the said State further says, that a majority of the directors appointed in the said Baltimore and Ohio Railroad Company on behalf of this State, did afterwards, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-eight, certify to the said treasurer in writing, supported by the oath of a majority of the said directors, that with the subscription to the capital stock of said company, authorized by the act of Assembly aforesaid, and with the subscription that the city of Baltimore had made to said capital stock by virtue of an act passed at December session, eighteen hundred and thirty-five, of the said Assembly, or independent of any subscription by any other public authority than the city of Baltimore as aforesaid, and of the city of Wheeling, and exclusive of any loan secured to it, exclusive of all future debts and profits due by said company on interest, the said railroad company had, in the opinion of the said directors, funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown, and Boonsborough, to its then present track near to Harper's Ferry.

And the said State in fact further says, that the said treasurer of the Western Shore did thereupon, to wit, on the twenty-fourth day of September, in the year of our Lord eighteen hundred and thirty-six, subscribe to the capital stock of each of the said corporations the sum of three millions of dollars. And the said treasurer did, pursuant to and in conformity with the provisions and conditions in the said act contained, pay for the said stock upon the requisitions of the president and directors of the said railroad company, the said sum of three millions of dollars. By means of which said

premises, and by force of the said act of Assembly, and the approval, assent and agreement of the said railroad company to its provisions and conditions, the said company became liable to pay to the said State of Maryland (for the use of Washington county) the said sum of one million of dollars, current money, if the said railroad company should fail to locate the said road through Cumberland, Hagerstown and Boonsborough, and through each of the said places. Yet the said Baltimore and Ohio Railroad Company, not regarding their said contract in this behalf, but contriving and fraudulently intending to deceive the said State, and against the form of the said act of assembly, have not located the said road by way of and through Cumberland, Hagerstown and Boonsborough as they ought to have done, but on the contrary thereof have located and fixed the route of the said road beyond the limits of the State of Maryland, at a great distance, to wit, at the distance of twenty miles from Hagerstown and Boonsborough, and by a *rout* altogether wide of and different from the one so described and intended by the said act of Assembly. And whereas heretofore, at a session of the General Assembly of Maryland, begun and held at the city of Annapolis, on the last Monday of December, being the twenty-eighth day of the said month, in the year of our Lord one thousand eight hundred and thirty-five, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and thirty-six, another act was passed, entitled "An act for the promotion of internal improvement," by which it was, amongst other things, provided and enacted, that if the Baltimore and Ohio Railroad Company, in general meeting assembled, should approve, assent and agree to the several provisions of that act, and should communicate such approval, assent and agreement, under its corporate seal and the signature of its president, to the Governor of this State, on or before the first day of August then next, the treasurer of the Western Shore of Maryland should subscribe to the capital stock of said corporation the sum of three millions of dollars, and pay the same in the manner and upon the conditions thereinafter mentioned. And it was further provided that the said treasurer should, and he was thereby authorised and directed to pay from time to time, upon the requisitions of the president and directors of the said corporation, after six months notice, not exceeding one million of dollars to said company in any year, in the whole not more than three millions of dollars. And it was in and by the said act further provided and enacted, that the said treasurer should not make any payment aforesaid for subscription to the stock of the said company, until after a majority of the directors appointed therein on behalf of the State should have certified to the treasurer in writing, supported by the oath or affirmation of a majority of the said directors, that they sincerely believe that, with the subscription by that act authorized to be made to the said company's stock, and with the subscription which the city of Baltimore might have made, by virtue of an act of Assembly therein mentioned, or that independently

of any subscription by any other public authority than the city of Baltimore aforesaid, and of the cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future profits and debts due by the said company on interest, the said railroad company in their opinion had funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown and Boonsborough to its then track near to Harper's Ferry, and it was by the said act declared to be, and expressly made, the duty of the said company so to locate and construct the said road as to pass through each of the said places; which said provisions were made subject nevertheless to the proviso here following, that is to say: Provided, that if the said Baltimore and Ohio Railroad Company should not locate the said road in the manner provided for in that act, then and in that case they should forfeit one million of dollars to the State of Maryland, for the use of Washington county, as by the said act of Assembly more fully appears. And the said State of Maryland in fact says, that the said company did, in general meeting assembled, approve, assent and agree to the several provisions of the said act, and did communicate said approval, assent and agreement, under its corporate seal and the signature of its president, to the Governor of this State, before the said first day of August.

And the said State further says, that a majority of the directors appointed in the said Baltimore and Ohio Railroad Company on behalf of this State, did, afterwards, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-eight, certify to the said treasurer in writing, supported by the oath of a majority of the said directors, that with the subscription to the capital stock of said company, authorized by the act of Assembly aforesaid, and with *with* the subscription that the city of Baltimore had made to said capital stock, by virtue of an act passed at December session, eighteen hundred and thirty-five, of the said Assembly, or independent of any subscription by any other public authority than the city of Baltimore as aforesaid, and of the city of Wheeling, and exclusive of any loan secured to it, exclusive of all future debts and profits due by said company on interest, the said railroad company had, in the opinion of the said directors, funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown, and Boonsborough, to its then present track near to Harper's Ferry.

And the said State in fact further says, that the said treasurer of the Western Shore did, thereupon, subscribe to the capital stock of the said corporation the said sum of three millions of dollars, and did, pursuant to, and in conformity with, the provisions and conditions in the said act contained in this behalf, pay for the said stock to the said company the said sum of three millions of dollars.

By means of the premises, and by force of the said act of Assembly, and the assent, approval, and agreement of the said company, in manner and form aforesaid, and in consideration of the payment

as aforesaid of the said sum of three millions of dollars, in manner and upon the conditions aforesaid, the said company became liable to pay to the said State of Maryland (for the use of Washington county) the said sum of one million of dollars, current money, if the said company should fail to locate the said road through Cumberland, Hagerstown, and Boonsborough, and through each of the said places. Yet the said company, not regarding their said contract in this behalf, but contriving and intending to deceive the said State in this behalf, have not located the said road by way of and through Cumberland, Hagerstown, and Boonsborough, as they ought to have done, but, on the contrary thereof, and against the form of the said act of Assembly, have located and fixed the route of the said road beyond the limits of the State of Maryland, at a great distance, to wit, at the distance of twenty miles from Hagerstown and Boonsborough, and by a route wholly wide of, and different from, the one so designated and fixed by the said act of Assembly.

And whereas, also, heretofore, at a session of the General Assembly of Maryland, begun and held at the city of Annapolis, on the last Monday of December, being the twenty-eighth day of the said month, in the year of our Lord one thousand eight hundred and thirty-five, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and thirty-six, another act was passed, entitled, "An act for the promotion of internal improvement," by which, amongst other things, it was provided and enacted, that if the Chesapeake and Ohio Canal Company and the Baltimore and Ohio Railroad Company, in general meeting of said corporations respectively assembled, should approve, assent, and agree to the several provisions of that act, so far as they were applicable to the said corporations respectively, and should severally communicate said approval, assent, and agreement, under their corporate seals, and the signatures of their presidents, to the Governor of this State, on or before the first day of August then next, the treasurer of the Western shore of Maryland should subscribe to the capital stock of each of said corporations the sum of three millions of dollars, and pay for the same in the manner and upon the conditions thereinafter mentioned.

And it was further provided and enacted, in and by the said act, that the said treasurer should be, and he was thereby, authorized and directed to pay, from time to time, upon the requisition of the president and directors of the said companies respectively, after six months notice, not exceeding one million of dollars to each of said companies in any year; in the whole, not more than three millions of dollars to each of them.

And it was further provided and enacted, in and by the said act, that the said treasurer should not make any payment aforesaid for subscription to the stock of the Baltimore and Ohio Railroad Company, until after a majority of the directors, appointed therein on behalf of this State, should have certified to the treasurer in writing,

supported by the oath or affimation of a majority of said directors, that they sincerely believe in their certificate and statement, that, with the subscription by that act authorized to be made to said company's stock, and with the subscription which the city of Baltimore might have made, by virtue of an act passed at December session, of the year eighteen hundred and thirty-five, of the said Assembly, or that independently of any subscription by any other public authority than the city of Baltimore as aforesaid, and of the cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future profits and debts due by the company on interest, the said railroad company, in their opinion, had funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown, and Boonsborough, to its then present track near to Harper's Ferry; and it was thereby declared to be, and made the duty of the said company to, and that they should so, locate and construct the said road so as to pass through each of said places. Which said provisions were made subject nevertheless to this proviso, in the said act enacted and contained, that is to say: provided, that if the said Baltimore and Ohio Railroad Company should not locate the said *roade* in the manner provided for in that act, then, and in that case, they should forfeit one million of dollars to the State of Maryland, for the use of Washington county, as by the said act of Assembly more fully appears.

And the said State of Maryland in fact says, that the said Chesapeake and Ohio Canal Company, and the said Baltimore and Ohio Railroad Company, did, in general meeting of the said corporations respectively assembled, approve, assent, and agree to the several provisions of the said act, so far as they were applicable to the said corporations respectively, and did severally communicate said approval, assent, and agreement, under their corporate seals, and the signatures of the presidents, to the Governor of this State, before the said first day of August then next; that is to say, the said Chesapeake and Ohio Canal Company, in a general meeting of said corporation assembled on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and thirty-six, at the city of Washington, did approve, assent, and agree to the several provisions of the said act, so far as they were applicable to the said Chesapeake and Ohio Canal Company, and did, afterwards, and before the said first day of August, to wit, on the twenty-ninth day of July, in the year last aforesaid, communicate the said approval, assent, and agreement, under its corporate seal and the signature of its president, to the Governor of this State. And the said Baltimore and Ohio Railroad Company, in general meeting of the said corporation assembled in the city of Baltimore on the eighteenth day of July, in the year last aforesaid, did approve, assent, and agree to the several provisions of the said act, so far as they were applicable to the said Baltimore and Ohio Railroad Company, and

did afterwards, and before the said first day of August, to wit, on the twenty-sixth day of July, in the year last aforesaid, communicate its said approval, assent, and agreement, under its corporate seal and the signature of its president, to the Governor of this State.

And the said State further says, that a majority of the directors, appointed in the said Baltimore and Ohio Railroad Company on behalf of this State, did afterwards, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-eight, certify to the said treasurer in writing, supported by the oath of a majority of said directors, that with the subscription to the capital stock of said company, authorized by the act of Assembly aforesaid, and with the subscription that the city of Baltimore had made to said capital stock, by virtue of an act passed at December session, eighteen hundred and thirty-five, of the said Assembly, or independent of any subscription by any other public authority than the city of Baltimore as aforesaid, and of the city of Wheeling, and exclusive of any loan secured to it, exclusive of all future debts and profits due by said company on interest, the said railroad company had, in the opinion of the said directors, funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown, and Boonsborough, to its then present tract near to Harper's Ferry.

And the said State in fact further says, that the said treasurer of the Western Shore did, thereupon, to wit, on the twenty-fourth day of September, in the year of our Lord eighteen hundred and thirty-six, subscribe to the capital stock of each of the said corporations the sum of three millions of dollars; and the said treasurer did, pursuant to, and in conformity with, the provisions and conditions in the said act contained, pay for the said stock, upon the requisitions of the president and directors of the said railroad company, the said sum of three millions of dollars; by means of which said premises, and by force of the said act of Assembly, and the approval, assent, and agreement of the said railroad company to its provisions and conditions, the said company became liable to pay to the said State of Maryland (for the use of Washington county) the said sum of one million of dollars, current money, if the said railroad company should fail to locate the said road through Cumberland, Hagerstown, and Boonsborough, and through each of the said places. And the State of Maryland avers that the said company have not located the said road by way of, and through, Cumberland, Hagerstown, and Boonsborough, but, on the contrary, have located and fixed the same beyond the limits of the State of Maryland, at a great distance, to wit, at the distance of twenty miles from Hagerstown and Boonsborough, and by a route wide of, and wholly different from, the one so designated in and by the said act of Assembly. By reason whereof action hath accrued to the State of Maryland, for the use of the said Washington county, to demand and have of the said company, for the use aforesaid, the aforesaid sum

of one million of dollars, according to the terms of the said act, and the acceptance thereof by the said company.

And whereas also, heretofore, at a session of the General Assembly of Maryland, begun and held at the city of Annapolis on the last Monday of December, being the twenty-eighth day of the said month, in the year of our Lord one thousand eight hundred and thirty-five, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and thirty-six, another act was passed, entitled "An act for the promotion of internal improvement," by which it was, amongst other things, provided and enacted, that if the Baltimore and Ohio Railroad Company, in general meeting assembled, should approve, assent, and agree to the several provisions of that act, and should communicate such approval, assent, and agreement, under its corporate seal and the signature of its President, to the Governor of this State, on or before the first day of August then next, the treasurer of the Western Shore of Maryland should subscribe to the capital stock of said corporation the sum of three millions of dollars, and pay the same in the manner, and upon the conditions thereinafter mentioned.

And it was further provided that the said treasurer should, and he was thereby authorized and directed to pay, from time to time, upon the requisition of the president and directors of the said corporation, after six months notice, not exceeding one million of dollars to said company in any year; in the whole not more than three millions of dollars. And it was in and by the said act further provided and enacted, that the said treasurer should not make any payment aforesaid, for subscription to the stock of the said company, until after a majority of the directors appointed therein on behalf of the State should have certified to the treasurer, in writing, supported by the oath or affirmation of a majority of the said directors, that they sincerely believe that, with the subscription by that act authorized to be made to the said company's stock, and with the subscription which the city of Baltimore might have made by virtue of an act of Assembly therein mentioned; or that, independently of any subscription by any other public authority than the city of Baltimore aforesaid, and of the cities of Pittsburg and Wheeling; and exclusive of any loan secured to it, exclusive of all future profits and debts due by the said company on interest, the said railroad company, in their opinion, had funds sufficient to complete the said railroad from the Ohio river, by way of, and through, Cumberland, Hagerstown, and Boonsborough, to its then track near to Harper's Ferry; and it was by the said act declared to be, and expressly made, the duty of the said company so to locate and construct the said road as to pass through each of the said places; which said provisions were made, subject, nevertheless, to the proviso here following, that is to say: Provided, that if the said Baltimore and Ohio Railroad Company should not locate the said road in the manner provided for in that act, then, and in that case, they should forfeit

one million of dollars to the State of Maryland, for the use of Washington county, as by the said act of Assembly more fully appears. And the said State of Maryland, in fact, says, that the said company did, in general meeting assembled, approve, assent, and agree to the several provisions of the said act, and did communicate said approval, assent, and agreement, under its corporate seal and the signature of its president, to the Governor of this State, before the said first day of August. And the said State further says, that a majority of the directors appointed in the said Baltimore and Ohio Railroad Company on behalf of this State, did, afterwards, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-eight, certify to the said treasurer, in writing, supported by the oath of a majority of the said directors, that, with the subscription to the capital stock of said company authorized by the act of Assembly aforesaid, and with the subscription that the city of Baltimore had made to said capital stock, by virtue of an act passed at December session, eighteen hundred and thirty-five, of the said Assembly, or independent of any subscription by any other public authority than the city of Baltimore, as aforesaid, and of the city of Wheeling, and exclusive of any loan secured to it, exclusive of all future debts and profits due by said company on interest, the said railroad company had, in the opinion of the said directors, funds sufficient to complete the said railroad from the Ohio river, by way of, and through, Cumberland, Hagerstown, and Boonsborough, to its then present track near to Harper's Ferry. And the said State, in fact, further says, that the said treasurer of the Western Shore did, thereupon, subscribe to the capital stock of the said corporation the said sum of three millions of dollars; and did pursuant to, and in conformity with, the provisions and conditions in the said act contained in this behalf, pay for the said stock, to the said company, the said sum of three millions of dollars. By means of the premises, and by force of the said act of Assembly, and the assent, approval, and agreement of the said company, in manner and form aforesaid, and in consideration of the payment, as aforesaid, of the said sum of three millions of dollars, in manner and upon the conditions aforesaid, the said company became liable to pay to the said State of Maryland (for the use of Washington county) the said sum of one million of dollars, current money, if the said company should fail to locate the said road through Cumberland, Hagerstown, and Boonsborough, and through each of the said places. And the State of Maryland avers that the said company have not located the said road by way of, and through, Cumberland, Hagerstown, and Boonsborough, but, on the contrary, have located and fixed the same beyond the limits of the State of Maryland, at a great distance, to wit, at the distance of twenty miles from Hagerstown and Boonsborough, and by a route wide of, and wholly different from, the one so designated in and by the said act of Assembly. By reason whereof action hath accrued to the State of Maryland, for the use of the said Washing-

ton county, to demand and have of the said company, for the use aforesaid, the aforesaid sum of one million of dollars, according to the terms of the said act, and the acceptance thereof by the said company.

And whereas also heretofore, at a session of the General Assembly of Maryland, begun and held at the city of Annapolis, on the last Monday of December, being the twenty-eighth day of the said month, in the year of our Lord one thousand eight hundred and thirty-five, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and thirty-six, another act was passed, entitled "An act for the promotion of internal improvement," by which, amongst other things, it was provided, enacted, that if the Chesapeake and Ohio Canal Company and the Baltimore and Ohio Railroad Company, in general meeting of said corporations respectively assembled, should approve, assent and agree to the several provisions of that act, so far as they were applicable to the said corporations respectively, and should severally communicate said approval, assent and agreement, under their corporate seals and the signatures of their presidents, to the Governor of this State, on or before the first day of August then next, the treasurer of the Western Shore of Maryland should subscribe to the capital stock of each of said corporations the sum of three millions of dollars, and pay for the same in the manner and upon the conditions thereinafter mentioned. And it was further provided and enacted, in and by the said act, that the said treasurer should be, and he was thereby, authorized and directed to pay, from time to time, upon the requisition of the president and directors of the said companies respectively, after six months notice, not exceeding one million of dollars to each of said companies in any year, in the whole not more than three millions of dollars to each of them. And it was further provided and enacted, in and by the said act, that the said treasurer should not make any payment aforesaid for subscription to the stock of the Baltimore and Ohio Railroad Company, until after a majority of the directors, appointed therein on behalf of this State, should have certified to the treasurer in writing, supported by the oath or affirmation of a majority of said directors, that they sincerely believed in their certificate and statement, that with the subscription by that act authorized to be made to said company's stock, and with the subscription which the city of Baltimore might have made by virtue of an act passed at December session of the year eighteen hundred and thirty-five of the said Assembly, or that independently of any subscription by any other public authority that the city of Baltimore as aforesaid, and of the cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future profits and debts due by the company on interest, the said railroad company in their opinion had funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown and Boonsborough, to its then present tract near to

Harper's Ferry; and it was thereby declared to be, and made the duty of the said company to, and that they should so locate and construct the said *rail* so as to pass through each of said places; which said provisions were made subject nevertheless to this proviso, in the said act enacted and contained, that is to say: Provided, that if the said Baltimore and Ohio Railroad Company should not locate the said road in the manner provided for in that act, then and in that case they should forfeit one million of dollars to the State of Maryland, for the use of Washington county, as by the said act of Assembly more fully appears.

And the said State of Maryland in fact says, that the said Chesapeake and Ohio Canal Company and the said Baltimore and Ohio Railroad Company did, in general meeting of the said corporations respectively assembled, approve, assent and agree to the several provisions of the said act, so far as they were applicable to the said corporations respectively; and did severally communicate said approval, assent and agreement, under their corporate seals and the signatures of the presidents, to the Governor of this State, before the said first day of August then next, that is to say, the said Chesapeake and Ohio Canal Company, in a general meeting of said corporation assembled, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and thirty-six, at the city of Washington, did approve, assent and agree to the several provisions of the said act, so far as they were applicable to the said Chesapeake and Ohio Canal Company, and did afterwards, and before the said first day of August, to wit, on the twenty-ninth day of July, in the year last aforesaid, communicate the said approval, assent and agreement, under its *corporal* seal and the signature of its president, to the Governor of this State. And the said Baltimore and Ohio Railroad Company, in general meeting of the said corporation, assembled in the city of Baltimore on the eighteenth day of July, in the year last aforesaid, did approve, assent and agree to the several provisions of the said act, so far as they were applicable to the said Baltimore and Ohio Railroad Company, and did afterwards, and before the said first day of August, to wit, on the twenty-sixth day of July, in the year last aforesaid, communicate its said approval, assent and agreement, under its corporate seal and the signature of its president, to the Governor of this State. And the said State further says, that a majority of the directors appointed in the said Baltimore and Ohio Railroad Company, on behalf of this State, did afterwards, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-eight, certify to the said treasurer in writing, supported by the oath of a majority of said directors, that with the subscription to the capital stock of said company, authorized by the act of Assembly aforesaid, and with the subscription that the city of Baltimore had made to said capital stock by virtue of an act passed at December session, eighteen hundred and thirty-five, of the said Assembly, or independent of any

subscription by any other public authority than the city of Baltimore as aforesaid, and of the city of Wheeling, and exclusive of any loan secured to it, exclusive of all future debts and profits due by said company on interest, the said railroad company had, in the opinion of the said directors, funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown and Boonsborough, to its then present track near to Harper's Ferry.

And the said State in fact further says, that the said treasurer of the Western Shore did thereupon, to wit, on the twenty-fourth day of September, in the year of our Lord eighteen hundred and thirty-six, subscribe to the capital stock of each of the said corporations the sum of three millions of dollars. And the said treasurer did, pursuant to and in conformity with the provisions and conditions in the said act contained, pay for the said stock upon the requisitions of the president and directors of the said railroad company the said sum of three millions of dollars. By means of which said premises, and by force of the said act of Assembly, and the approval, assent and agreement of the said railroad company to its provisions and conditions, the said company became liable to pay to the said State of Maryland, (for the use of Washington county,) the said sum of one million of dollars, current money, if the said railroad company should fail to locate the said road through Cumberland, Hagerstown and Boonsborough, and through each of the said places. And the State of Maryland avers that the said company have not located the said road by way of and through Cumberland, Hagerstown and Boonsborough, but on the contrary have located and fixed the same beyond the limits of the State of Maryland, at a great distance, to wit, at the distance of twenty miles from Hagerstown and Boonsborough, and by a route wide of and wholly different from the one so designated in and by the said act of Assembly. By reason whereof the said company became and is indebted, and owes to the State of Maryland, for the use of said Washington county aforesaid, the aforesaid sum of one million of dollars, according to the terms of the said act, and the acceptance thereof by the said company.

And whereas also heretofore, at a session of the General Assembly of Maryland, begun and held at the city of Annapolis, on the last Monday of December, being the twenty-eighth day of the said month, in the year of our Lord one thousand eight hundred and thirty-five, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and thirty-six, another act was passed, entitled "An act for the promotion of internal improvement," by which it was amongst other things provided and enacted, that if the Baltimore and Ohio Railroad Company, in general meeting assembled, should approve, assent and agree to the several provisions of that act, and should communicate such approval, assent and agreement, under its corporate seal and the signature of its president, to the Governor of this State, on or before the first day

of August then next, the treasurer of the Western Shore of Maryland should subscribe to the capital stock of said corporation the sum of three millions of dollars, and pay the same in the manner and upon the conditions thereinafter mentioned. And it was further provided, that the said treasurer should, and he was thereby authorized and directed to pay from time to time, upon the requisition of the president and directors of the said corporation, after six months notice, not exceeding one million of dollars to said company in any year, in the whole not more than three millions of dollars.

And it was in and by the said act further provided and enacted, that *that* the said treasurer should not make any payment aforesaid, for subscription to the stock of said company, until after a majority of the directors, appointed therein on behalf of the State, should have certified to the treasurer in writing, supported by the oath or affirmation of a majority of said directors, that they sincerely believe, that with the subscription by that act authorized to be made to the said companies' stock, and with the subscription which the city of Baltimore might have made, by virtue of an act of Assembly therein mentioned, or that independent of any subscription by any other public authority than the city of Baltimore aforesaid, and of the cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future profits and debts due by the said company on interest, the said railroad company, in their opinion, had funds sufficient to complete the said railroad from the Ohio river, by way of, and through Cumberland, Hagerstown, and Boonsborough, to its then track, near to Harper's Ferry. And it was by the said act declared to be, and expressly made the duty of the said company, so to locate and construct the said road as to pass through each of the said places. Which said provisions were made subject, nevertheless, to the proviso here following, that is to say: Provided, that if the said Baltimore and Ohio Railroad Company should not locate the said road in the manner provided for in that act, then, and in that case, they should forfeit one million of dollars to the State of Maryland, for the use of Washington county, as by the said act of Assembly more fully appear.

And the said State of Maryland in fact says, that the said company did, in general meeting assembled, approve, assent, and agree to the several provisions of the said act, and did communicate said approval, assent, and agreement, under its corporate seal, and the signature of its president, to the Governor of this State, before the said first day of August.

And the said State further says, that a majority of the directors, appointed in the said Baltimore and Ohio Railroad Company on behalf of this State, did, afterwards, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-eight, certify to the said treasurer in writing, supported by the oath of a majority of the said directors, that with the subscription

to the capital stock of said company, authorized by the act of Assembly aforesaid, and with the subscription that the city of Baltimore had made to said capital stock, by virtue of an act passed at December session, eighteen hundred and thirty-five, of the said Assembly, or independent of any subscription by any other public authority than the city of Baltimore as aforesaid, and of the city of Wheeling, and exclusive of any loan secured to it, exclusive of all future debts and profits due by said company on interest, the said railroad company had, in the opinion of the said directors, funds sufficient to complete the said railroad from the Ohio river, by way of, and through Cumberland, Hagerstown, and Boonsborough, to its then present track near to Harper's Ferry.

And the said State, in fact, further says, that the said treasurer of the Western Shore did, thereupon, subscribe to the capital stock of the said corporation, the said sum of three millions of dollars, and did, pursuant to, and in conformity with, the provisions and conditions in the said act contained, in this behalf pay for the said stock, to the said company, the said sum of three millions of dollars. By means of the premises, and by force of the said act of Assembly, and the assent, approval, and agreement of the said company, in manner and form aforesaid, and in consideration of the payment as aforesaid, of the said sum of three millions of dollars, in manner and upon the conditions aforesaid, the said company became liable to pay to the said State of Maryland (for the use of Washington county) the said sum of one million of dollars, current money, of the said company should fail to locate the said road through Cumberland, Hagerstown, and Boonsborough, and through each of said places.

And the State of Maryland avers, that the said company have not located the said road by way of and through Cumberland, Hagerstown, and Boonsborough, but, on the contrary, have located and fixed the same beyond the limits of the State of Maryland, at a great distance, to wit, at the distance of twenty miles from Hagerstown, and Boonsborough, and by a route wide of, and wholly different from, the one so designated in and by the said act of Assembly. By reason whereof, the said company became and is indebted, and owes to the State of Maryland, for the use of said Washington county aforesaid, the aforesaid sum of one million of dollars, according to the terms of the said act, and the acceptance thereof by the said company.

And whereas, also, the said Baltimore and Ohio Railroad Company, before and at the times hereinafter in this court mentioned, was, and still is, a body corporate, chartered by law for the purpose of constructing a railroad from the city of Baltimore to some point on the Ohio river.

And whereas the said Baltimore and Ohio Railroad Company, under and by virtue of a certain other act of the General Assembly of Maryland, passed at a session thereof, begun and held at the city

of Annapolis, on the last Monday of December, being the twenty-eighth day of the said month, in the year of our Lord eighteen hundred and thirty-five, entitled "An act for the promotion of internal improvement;" and under and by virtue of the terms and provisions thereof, the said railroad company, to wit, on the fourth day of May, in the year of our Lord one thousand eight hundred and thirty-six, at the county aforesaid, bound themselves to forfeit and pay to the said State of Maryland (for the use of Washington county) another sum of one million of dollars, if they did not locate their said railroad by way of and through Cumberland, Hagerstown, and Boonsborough, and through each of the said places, to its then track near to Harper's Ferry.

And the said State avers, that although it hath always, from the time of the passing of the said act of Assembly, hitherto well and truly performed, fulfilled, and kept all things in said act contained, on its part and behalf to be performed, fulfilled, and kept, according to the tenor and effect thereof, to wit, at the county aforesaid; yet protesting that the said Baltimore and Ohio Railroad Company have not performed, fulfilled, and kept any thing in the said act of Assembly contained, on their part and behalf to be performed, fulfilled, and kept, according to the tenor and effect thereof, the said State saith, that the said Baltimore and Ohio Railroad Company hath not located its said road by way of and through Hagerstown and Boonsborough, but on the contrary thereof, have located and fixed the route of the said road beyond the limits of the State of Maryland, at a great distance, to wit, the distance of twenty miles from Hagerstown and Boonsborough, and by a *rout* wholly wide of, and different from, the one which, by their obligation aforesaid, they were bound to do. By reason whereof, action hath accrued to the said State of Maryland, (for the use of Washington county aforesaid,) to demand and have of the said company, for the use aforesaid, the said sum of one million of dollars, according to the terms of the said act of Assembly.

Yet the said Baltimore and Ohio Railroad Company, although often requested by the said State, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and thirty-nine, to wit, at the county aforesaid, hath not yet paid the said several sums of money above demanded, or either of them, or any part thereof, but hath hitherto wholly neglected *any* refused, and still doth neglect and refuse so to do, to the damage of the said State of two millions of dollars, current money; and therefore it brings suit, &c.

WILLIAM PRICE,
JERVIS SPENCER,
Att'ys for plaintiff.

At which mentioned fourth Monday of February, being the twenty-second day of the said month, in the year of our Lord one thou-

sand eight hundred and forty-one, and the day of the return of the aforegoing writ, comes into the county court here the said State by its attornies aforesaid; and the sheriff of Frederick county aforesaid, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

"Sum'd R. H. Marshall and Wm. S. McPherson, esqrs., non sunt residue.

HY. HOUCK, *Sheriff*."

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and by order of the court here thereon, is further continued until the fourth Monday of October next.

At which said fourth Monday of October, in the year of our Lord one thousand eight hundred and forty-one, comes again into the county court here, as well the said State, by its attornies aforesaid, and also the said Baltimore and Ohio Railroad Company, by Frederick A. Schley, esq., its attorney, comes and defends the wrong and injury, when and so forth, and says, that the said Baltimore and Ohio Railroad Company does not owe to the State of Maryland for the use of Washington county that sues as aforesaid, or to the State of Maryland, or to Washington county, the said sum of one million of dollars current money above demanded, or any part thereof, in manner and form as the said plaintiff that sues as aforesaid hath above thereof complained against said defendant; and of this the said defendant puts itself upon the country, and so forth. And for a further plea in this behalf the said defendant, by the leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, saith that the said plaintiff its action aforesaid thereof against the said defendant to have or maintain any further ought not, because the said defendant saith that, after the last continuance of the plea aforesaid, to wit: the fourth Monday of February, in the year eighteen hundred and forty-one, from which day the plea aforesaid was further continued here until this day, to wit, this fourth Monday in the month of October, in the year eighteen hundred and forty-one, and before this day, to-wit, on the tenth day of March, in the year last aforesaid, the General Assembly of the State of Maryland passed an act, entitled "An act to repeal certain parts of the act entitled an act for the promotion of internal improvement, passed at December session, eighteen hundred and thirty-five, chapter three hundred and ninety-five," by which it was amongst other things enacted, "that so much of the fifth section of the act entitled an act for the promotion of internal improvement, passed June fourth, eighteen hundred and thirty-six, chapter three hundred and ninety-five, as makes it the duty of the Baltimore and Ohio Railroad Company to construct the said road so as to pass through Hagerstown and Boonsborough, be and the same was thereby repealed, and the said forfeiture of

one million of dollars, reserved to the said State of Maryland as a penalty in case the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in that act, be and the same was thereby remitted and released, and any suit instituted to recover the same sum of one million of dollars, or any part thereof, be and the same was thereby declared to be discontinued and of no effect, as fully appears by the said act, and this the said defendant is ready to verify, and so forth; and therefore the said defendant prays judgment, if the said State its action aforesaid thereof against the said defendant any further to have or maintain ought, and so forth; with this, that the said defendant will also verify that the Baltimore and Ohio Railroad Company in the last said act of Assembly mentioned, and the aforesaid Baltimore and Ohio Railroad Company in the declaration aforesaid above mentioned, are one and the same company, and not other or different; and that the forfeiture of one million of dollars reserved to the State of Maryland as a penalty, which is released by the last said act of Assembly, and the one million of dollars in the declaration aforesaid above mentioned, are one and the same sum of money and penalty; and that the suit in which this plea is filed is the only suit brought by the said State to recover the said penalty or sum of one million of dollars.

FREDERICK A. SCHLEY,
Attorney for defendant.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attornies aforesaid, and by order of the court here thereon, is further continued until the fourth Monday of February next.

At which said fourth Monday of February, in the year of our Lord one thousand eight hundred and forty-two, comes again into the county court here as well the said State, by its attornies aforesaid, as the said Baltimore and Ohio Railroad Company, by its attorney aforesaid; and thereupon the parties aforesaid by their attornies aforesaid, *by their attornies aforesaid*, file in court here the following statement of facts, to wit:

Frederick county court, February term, 1842.

THE STATE OF MARYLAND, use of the Commissioners of Washington county,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

It is admitted in this case that the commissioners of Washington county, the parties at whose instance this action was instituted for the use of Washington county, were, at the time of institution of this suit, and still are, a body corporate, duly elected and organized, under and by virtue of the act of Assembly of Maryland of 1829, chapter 21, and its supplementary acts. It is also admitted that

the defendants are, and were at the institution of this suit, a body corporate, duly existing under and by virtue of the act of Assembly of Maryland of 1826, chapter 123, and its supplementary acts. It is also admitted that this suit is brought at the instance of said Commissioners of Washington county to recover, for the use of said county, the one million of dollars which they allege to be forfeited to the said State, for the use of *of* said county, under the provisions of the fifth section of the act of 1835, chapter 395; and it is admitted that the said defendants have not, and had not at the institution of this suit, constructed or located their road from the Ohio river, by way of and through Hagerstown and Boonsborough, to the track of said road at Harper's Ferry, as the same existed at the time of the passage of the said act of 1835, chapter 395; but on the contrary had, at the institution of this suit, finally located, and are, were then, and are now, constructing their said road by a different route, and without the limits of Washington county, within which the said Hagerstown and Boonsborough are situated. It is admitted that the said Baltimore and Ohio Railroad Company, in general meeting of the said corporations, did accept, assent and agree to the several provisions of the said act of 1835, chapter 395, and did duly communicate their said approval, assent and agreement, under their corporate seal and the signature of their president, to the Governor of this State, in the manner and within the time prescribed by the said act; which approval, assent and agreement, together with the report of the engineer of the said railroad company, which was required by the said act to accompany the same, were as follows, viz.:

At a general meeting of the stockholders of the Baltimore and Ohio Railroad Company, held at the office in the city of Baltimore, on Monday the 18th day of July, 1836, in pursuance of public notice to that effect given on the 15th day of June, 1836, for the purpose of taking into consideration, and acting upon "an act of the General Assembly of Maryland, passed at the extra session of May, 1836, entitled "an act for the promotion of internal improvement, the honorable Nicholas Brice in the chair, and John I. Donaldson secretary. It appearing that 22,554 shares of the stock were represented, a majority of the whole number, an act of the General Assembly of Maryland, passed at the extra session of May, 1836, was laid before the meeting; whereupon it was—

Resolved, that the Baltimore and Ohio Railroad Company, in general meeting assembled, do approve, assent and agree to the several provisions of an act of the General Assembly of Maryland, passed at the extra session of May, 1836, entitled "An act for the promotion of internal improvement, so far as they are applicable to this corporation, and that the president be requested to forward to the Governor of the State of Maryland, before the first day of August next, a copy of this resolution, under the signature of the said president, and the corporate seal of this corporation. Re-

solved, that the stockholders of the Baltimore and Ohio Railroad Company, in general meeting assembled, do hereby stipulate, agree, and bind the said company to guarantee to the State of Maryland, (after the expiration of three years from the payment, by the State, of each of the instalments on the stock authorized to be subscribed on its part to the stock of the said company by an act passed by the legislature of Maryland at the extra session of May, 1836, entitled "An act for the promotion of internal improvement," should such subscription be made,) the payment from that time, out of the profits of the work, of six per centum per annum, payable semi-annually, on the amount of money which shall be paid to the company under and by virtue of that act, until the clear nett annual profits of the Baltimore and Ohio Railroad shall be more than sufficient to discharge the interest which this company shall be so liable to pay to the State of Maryland, and shall be adequate to a dividend of six per centum per annum among its stockholders; and thereafter the State shall, in reference to the stock so subscribed for, and on so much thereof as the State may hold, be entitled to have and receive a perpetual dividend of six per centum per annum upon the profits of the work as declared from time to time, and no more; and all and so much of such annual profits as shall exceed six per centum per annum shall be distributed to the other stockholders according to their several interests in the said company: it being the intention of the meeting, in the passage of this resolution, to comply fully with the requisition of the 9th section of the act aforesaid, touching the guarantee of the interest as therein mentioned.

Resolved, that the president be directed to cause to be prepared a proper instrument of writing, binding the company in the terms of the aforegoing resolution, and to sign the same, and to fix the corporate seal of this company thereto, and to lodge the same with the treasurer of the Western Shore of Maryland.

Resolved, that the meeting adjourn until Thursday morning next, the 21st inst., at 10 o'clock, at Commerce street Hall.

Signed, N. BRICE, *Chairman.*

JOHN I. DONALDSON, *Secretary.*

In witness that the foregoing is a true copy, taken from the minutes and records of the proceedings of the stockholders of the Baltimore and Ohio Railroad Company, held on [SEAL. PLACE.] the eighteenth July, 1836, I have hereunto subscribed my name, and caused the seal of the said company to be affixed hereto, this 26th day of July, eighteen hundred and thirty-six.

Signed, WM. STEWART,
Pres't pro tem. Balt. & Ohio Railroad Company.

STATE OF MARYLAND, *to wit:*

I, Cornelius McLean, Secretary of State for the State of Mary-

land, do hereby certify that the aforegoing is a true copy of the acceptance of the act passed at the extra session of May, 1836, entitled "An act for the promotion of internal improvement," by the stockholders of the Baltimore and Ohio Railroad Company.

In witness whereof, I have hereunto set my hand, on this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and forty.

CORNELIUS McLEAN,
Secretary of State.

First report of engineer, &c., to the Treasurer, as follows, viz:

We, the undersigned, being a majority of the directors appointed in the Baltimore and Ohio Railroad Company, in behalf of the State of Maryland, do hereby certify, to the treasurer of the Western Shore of Maryland, that, with the subscription to the capital stock of said company, authorized by the act of the General Assembly of Maryland, passed at December session, 1835, chapter 395, entitled "An act for the promotion of internal improvement," and with the subscription that the city of Baltimore has made to said capital stock, by virtue of an act passed at December session, 1835, of said General Assembly, chapter 127, entitled an act to authorize the city of Baltimore to subscribe to the capital stock of the Baltimore and Ohio Railroad; or, independent of any subscription by *an* other public authority than the city of Baltimore, as aforesaid, and of the city of Wheeling, and exclusive of any loan secured to it, exclusive of all future debts and profits due by said company on interest, the said railroad company have, in the opinion of the undersigned, funds sufficient to complete the said railroad from the Ohio river, by way of, and through, Cumberland, Hagerstown, and Boonsborough, to its present track near to Harper's Ferry. And the undersigned, in conformity with the act of Assembly, first aforesaid, do hereby accompany this certificate with an estimate and report of the chief engineer, and engineer of location and construction of said company, as prescribed by said act; shewing the whole cast of said work according to the plan of construction therein described, which is made the basis of this certificate, will not be greater than the amount of funds which the undersigned have hereinbefore certified.

SAMUEL SPRIGG,
AMOS A. WILLIAMS,
WILLIAM COOKE,
JAS. L. HAWKINS,
JAS. HARWOOD,
J. S. NICHOLAS,
JOHN P. KENNEDY.

True copy: teste,

GEORGE MACKUBIN,
Treas'r W. S. Md.

28th January, 1842.

STATE OF MARYLAND, *City of Baltimore, sct:*

Be it remembered that, on this first day of October, in the year eighteen hundred and thirty-eight, before me, the subscriber, a justice of the peace of said State residing in the city, personally appeared Samuel Sprigg, Amos A. Williams, Wm. Cooke, James L. Hawkins, I. S. Nicholas, John P. Kennedy, and James Harwood, and made oath on the holy evangely of Almighty God, that they sincerely believe in the aforegoing certificate and statement.

Sworn before

JAS. B. LATIMER.

ENGINEER'S OFFICE, BALTO. & OHIO R. R. Co.,
Baltimore, Sept'r 20th, 1838.

To LOUIS MCLANE, Esq'r,
Pres't B. & O. Railroad Company:

SIR: In conformity with your instructions I have the honor to present an estimate of the funds sufficient to complete the Baltimore and Ohio railroad from the Ohio river, by way of, and through, Cumberland, Hagerstown, and Boonsborough, to its present track near to Harper's Ferry," this being the route indicated in the act of the General Assembly of Maryland, of December session 1835, chapter 395, section 5. This estimate has been made *has been made* out, after a particular and minute survey of the route by me as the engineer of location, having in view the provisions of the act of Assembly requiring that such a survey should be made, and also that the estimates founded thereon *shougld* be verified by the affidavit of the engineer.

The act of Assembly does not indicate any particular point on the Ohio river as a terminus of the road, and the present report may therefore be based upon a route ending at the point on that river which approaches the nearest to Harper's Ferry," and to which the road may be carried at the least expense. This point is to be found at the city of Pittsburg, situated at the confluence of the two rivers, 3rd, forming the Ohio; and as this terminus comes within the obvious and natural meaning of the terms employed in the act, it is here adopted; and the rather, as the incorporation of the company by Pennsylvania, thro' whose territory the surveys have shewn the necessity that the route should pass on its way to the Ohio, is conditional upon the making of that city one of the terminations of the road.

The route estimated will therefore be the route from Pittsburg on the Ohio river, by way of, and through, Cumberland, Hagerstown, and Boonsborough, to its present track near to Harper's Ferry. The act of Assembly describes the route as running from west to east, commencing upon the Ohio, and terminating near Harper's Ferry; but as in the making of the surveys the several parties engaged therein generally advanced from east to west upon the several divisions of the whole route *allot* to them, and as it is more conve-

nient that the estimates should pursue the order of the surveys, I have treated the route as a completion to the Ohio of the existing road now ending in its incomplete condition near Harper's Ferry. The surveys for this extension of the road to the Ohio occupied the greater part of the years 1836 and 1837. No practicable route in the direction proposed was neglected, and estimates of distance, both actual and virtual, and of cost of construction, repairs, and moving power were carefully made upon each, and used in the comparison of the routes which conflicted with each other. This extension system of surveys, with their appropriate drawings and calculations, was made necessary by the broken topography of the country intervening between the termini of the route, a considerable number of distinct lines offering themselves for the passage of the road over a surface so uneven and so intersected by water courses, and the ridges and mountains dividing them *them* from each other. It is not consistent with the condensed character of the report to present more than the general results of the numerous surveys and comparative estimates here mentioned. I will proceed, then, at once to lay before you the particulars of that route between a point near Harper's Ferry and the city of Pittsburg on the Ohio, which has been found to be the shortest and best among those which conform with the requisitions of the act of Assembly. It will be proper in the outset to state the general principles upon which the estimates of costs are founded, that the confidence in their correctness, imparted by the manner in which they are required to be verified may be confirmed by an exhibition of the grounds upon which they rest.

It should, then, be first observed that, in the tracing of the various lines, a considerable degree of care was taken to select the best ground for the route under survey, in order that the grades and curvatures might be properly established, and the quantities of excavation, embankment, masonry, and bridging, be determined with as much precision as practicable.

Under the head of graduation is included the excavations and embankments required for preparing the surface of the road for receiving the railway. The assumed average width of that surface has been (with a very few exceptions) 26 feet—a sufficient breadth to accomodate a double track, tho' with the expectation, justified by experience, that the single tract, which will at first be laid down, will, with the necessary sidings, suffice, for a considerable prospective period, for the business of the road. The calculations of the quantities of earth and other materials to be removed in the graduation were derived from the longitudinal and transversal profile of the ground and grade lines, aided occasionally by the exercise of the judgment as to the probable future change of these quantities which might result from modifications in the line to be made in the final staking out of it for contract. In dividing the masses to be excavated into the different classes of material composing

them, and assuming the probable proportions of earth and rock of their respective different degrees of tenacity and hardness, the inferences respecting the qualities of the strata which superficial appearances warranted, were corrected by a knowledge of the general geological structure of the region; and the distances to which the materials are to be removed being, in every case, correct, their certainty adds not a little to the probable truth of the estimates.

The title of masonry and bridging embraces stone work of every description, whether composing culverts, viaducts, or support, or protection walls; the term bridging more particularly referring to the wooden superstructures of those viaducts in which the stone arch was rejected. In this department of the estimates, there is but little room for error, as the prices of both stone and wood work are founded upon principles as clearly established as those governing estimates of earth and rock work, and of easy application to local circumstances upon the various routes. The railway forms the remaining divisions of the work, and includes the costs of the materials, with their transportation and distribution, and of the labor necessary to the construction of the track. The act of Assembly describes no particular form of railway, and we are left to choose among the different plans, of various costs, the one which, under the circumstances, it would seem most proper to adopt as the basis of the estimates now presented; and, in making this selection, the ability of the company to execute the plan selected, with the means at their command, was necessarily a prominent consideration.

True copy.

Test: GEORGE MACKUBIN,
Treas'r W. S. Md.

28th Jan'y, 1842.

The track upon the present road between Baltimore and Harper's Ferry, is the one which was in use at the time of the passage of the act of Assembly, and its continued use in the completion of the work to the Ohio, was probably contemplated by that law, and though unquestionably much inferior in its construction to the improved railway of more costly character, it is yet, as has been shewn on this, as well [as] other roads in the United States, capable of supporting a large and not uprofitable trade and travel. It is moreover the sort of track which has been usually resorted to by those railway companies, where funds were not sufficient to justify the use of a structure more expensive in the outset, though most economical in the end. The railway here estimated for is, for the above reasons, of the same general design (the plate rail being used, though upon a more solid frame of wood) with the one already in use on the Baltimore and Ohio railroad, and forming the present track near Harper's Ferry, of which the act makes mention. Its employment must not however be understood to be recommended

by the undersigned, should the funds of the company either at once or ultimately permit them to employ a more substantial and durable description of track. Such are the data upon which the following estimates are founded, and which have been applied to the route indicated in the act of Assembly, and about to be described, and to all others with which it has been in whole or in part compared.

True copy.

Test: GEORGE MACKUBIN,
Treas'r. W. S. Md.

28th Jan'y, 1842.

The act of Assembly does not more specifically designate the point upon the present Baltimore and Ohio railroad, from which the proposed westward extension of the work is to take place, than is implied in the words of the act "near Harper's Ferry." Some latitude being thus allowed in the selection of a point of beginning, that point has been established at the mouth of the little Catoctin creek, in the Valley of the Potomac, $8\frac{1}{8}$ miles below or east of Harper's Ferry, and $73\frac{1}{2}$ miles by the line of the railroad from the city block in Baltimore. To obtain the best line through Boonsborough and Hagerstown, in compliance with the provisions of the act, it was necessary to leave the present track thus far eastward of the extreme point which it has already reached. The route therefore begins at the mouth of the little Catoctin first mentioned, and ends at the city of Pittsburg, and thus in its two termini, as well *as well* as in its intermediate *cours*, fully obeys the requisitions of the law. To facilitate the description of the route, and bring its principal points of interest, and its main topographical features into view, it will be divided into three grand divisions, severally entitled: the eastern or Potomac division, the middle or mountain division, the western or Ohio division. *The eastern division* extends from the mouth of the little Catoctin, $8\frac{1}{8}$ miles below Harper's Ferry, to a point on the northern or Maryland shore of the Potomac $\frac{3}{4}$ of a mile east of Cumberland, and its length is 116 $\frac{211}{1000}$ miles. *The middle division* extends from the end of the eastern division to "Canoe Hollow," upon the south bank of the Youhioghany river, near the western base of Laurel Hill, and a short distance above Connellsville, and its length is 97 $\frac{466}{1000}$ miles.

The western division extends from the end of the middle division to the intersection of Ross and Third streets, in the city of Pittsburg, and its length is $60\frac{379}{1000}$ miles, making the total length of the 3 divisions $274\frac{056}{1000}$. The eastern division first presents itself upon this division. So numerous are the practicable routes on both sides of the Potomac, that when their different parts are combined in every possible way, there result no less than 26 routes between the Little Catoctin and Cumberland, each differing more or less from the rest. All of these routes have been compared carefully with each other, but as the object of this report is not to exhibit the bes,

route in the abstract, but the best among those which comply with the conditions of the act of Assembly, I proceed at once to submit the details of the latter.

The route departs from the Baltimore and Ohio Railroad at the mouth of the Little Catoctin, ascends that stream to the eastern base of the Blue Ridge or South mountain, and thence continues to ascend along its slope to a depression in its crest, called "Crampton's Gap;" thence passing through the mountain by a tunnel of 1,500 feet in length, it descends into "Pleasant Valley," lying between the South mountain and the Elk mountain, and proceeds along the western base of the former, to and through the town of Boonsborough; thence to a point near the village of Funkstown; and thence across the Antietam creek, above the Turnpike bridge, to the borough of Hagerstown; thence through the streets of that town, and over Salesbury ridge, to and across the Conococheague creek, about two miles north of Williamsport; thence to the lower end of the narrows of the North mountain; thence up the Potomac, on the Maryland shore, on the inner side of the Chesapeake and Ohio Canal, to a stream called Dry run; thence crossing the canal, and subsequently the river, above the mouth of Licking creek; and thence up the Virginia shore to Sleepy creek; thence continuing up the river on the same side, to and across the great Cacapon river; and thence to a great bend of the Potomac, which is cut off by a tunnell of 1,000 feet in length; thence to another bend, (opposite the canal tunnell now in progress,) which is also cut off but by an open excavation; thence to and across the Little Cacapon, the south branch of Potomac, and Patterson's creek, to a point about 6½ miles below Cumberland, where the route crosses the river to the Maryland shore; and thence upon the Maryland shore to the end of the eastern division, at station 127, three-fourths of a mile below Cumberland.

The distance, quantities, and estimated, cost of excavation, embankment, masonry, and bridging, and the estimated cost of the railing, laid with the plate rail of 15 lbs. to the yard, are shown in the following tabular statement of these details:

EXHIBIT A.

Of the length and cost of the Eastern division, extending from the Little Catoctin, by way of Boonsborough [and] Hagerstown to Cumberland.

Distance from mouth of Little Catoctin to station 127, ¾ of a mile below Cumberland.	Excavation or embankment.			Bridge masonry.			Bridge superstructure.	Support walling and culvert masonry.			Total amount.
Miles and decimals.	Cubic yds.	Price per yard.	Amount.	No. of ps.	Price per perch.	Amount.	Amount.	No. of ps.	Price per perch.	Amount.	
116.211 - - -	5,181,383	45.22	$2,344,293	71,050	4.98	$354,062	$65,321	69,536	1.64	$114,481	$2,878,157
Add for 116.211 miles of single railway, at $4,600 per mile - - - - - - -											$534,570
Total estimated cost of the road, complete with single track - - - - - - -											$3,412,727

Amounting to the sum of three millions four hundred and twelve thousand seven hundred and twenty-seven dollars, being at the rate of $29,349 per mile.

The route as described, after complying with the conditions of the act in passing through Boonsborough and Hagerstown, by subsequently crossing the Potomac near the break of the North mountain, and occupying the Virginia shore of the river to within a few miles of Cumberland, avoid all interferance with the Chesapeake and Ohio Canal, and obtains more favorable grounds than the Maryland shore could have offered, even had it not been pre-occupied by that work. The highest grade upon the route is about 53 feet per mile, and the shortest curvature about 600 feet radius.

The middle or mountain division is next in order, extending from near Cumberland to *Cause* hollow, and embracing the passage over the great dividing ridge of the Allegany, and through the several chains beyond it, to the western base of Laurel hill, which is the last mountain to be passed; upon this division there are three *routs*, of which the one preferred on account of its greater cheapness of construction, ease of grade, and other advantages, is described [as] follows:

The line commences at station 127, the end of the eastern division, three-fourths of a mile below Cumberland, and passes by way of and through the town, on its northeastern margin, to the narrows of Wills' mountain, where the mountain is broken by the creek of the same name. The creek is crossed by the route just above the new national road bridge, and the line, after crossing the road itself, pursues its way through the gap of the mountain, upon the slope above the turnpike, which last turns up the run. The line then, after crossing the run, ascends Wills' creek on its right or western bank, passing Jenning's run and Gladden's run, *comming* from the west, and reaching Little Wills' creek flowing from the northeast. To this point, 14 miles from Cumberland, the grades continue moderate, not exceeding about 26 feet to the mile, and the valley presents generally a fine expanse of bottom land. Near the mouth of Little Wills' creek, where the main stream begins to assume the character of a mountain ravine, begins the grade of sixty-six feet per mile, by which the mountain *durde* is to be passed; and this grade will be maintained with but slight relaxation hence to the summit level, twenty-two miles from the foot of the steep grade, and thirty-five miles from Cumberland. In ascending to the summit, the route passes through the break made by Wills' creek in Little Allegany and *and* Little Savage mountains, and approaches near to the eastern base of the Great Allegany or Meadow mountain, which last it is not however obliged to pass over, as the dividing ridge between the waters of Wills' creek and Casselsman's river is at the place a subordinate mountain range, connecting the Great Savage with the Great Allegany. The route then, after touching the fork of the latter near Bowman's saw-mill, takes a direction parallel to it, and mounts, by the slopes of Scafford camp and Shucles' run, to the depression at the spot called the "Sand Patch," when it passes the crest of the ridge by a tunnel*l* of about half a mile in length, at a

height of 1,670 feet above Cumberland, and 2,290 feet above tide; and descends thence with an inclination of 66 feet per mile by Flaugherty creek, through the cleft which it makes in the Meadow mountain to Myers' mills on that creek, near its meeting with Casselman's river; thence the route descends that river alternately on either bank, and by grades of about 26 feet per mile, to its confluence with Laurel Hill creek and the Youhioghany, called "Turkey foot;" and thence it pursues, with similar grades, the left bank of the Youhiogheny to Canoe hollow, near Connelsville, immediately west of the break of Laurel hill, and where the middle division of the line terminates. The limit of grade upon this division is about 66 feet per mile, and of curvature about 600 feet radius. The distance, quantities, and estimated cost of excavation, embankment, masonry, and bridging, and the estimated cost of the railway, are shown in the following tabular statement of these details:

EXHIBIT B.

Of the length and cost of the Middle division, extending from Cumberland to Canoe Hollow, by way of Will's creek, Casselman's, and Youhiogheny rivers.

Distance from station 127, ¾ of a mile below Cumberland, to station 1,340 at Canoe Hollow.	Excavation or embankment.			Bridge masonry.			Bridge superstructure.	Support walling and culvert masonry.			Total. amount.
Miles and Decimals.	Cubic yds.	Price per yard.	Amount.	No. of perches.	Price per perch.	Amount.	Amount.	No. of perches.	Price per perch.	Amount.	
97.466 - - -	2,897,475	42.15	$1,221,351	45,074	3.84	$173,228	$24,400	20,742	1.27	$36,520	$1,679,044
Add for 97.466 miles of single railway, at $4,600 per mile - - - - - - -											448,343
Total estimated cost of the road, complete with a single track - - - - - - -											2,127,387

Amounting to the sum of two millions *on* hundred and twenty-seven thousand three hundred and eighty-seven dollars, being at the rate of $21,827 per mile.

1177.

The middle or mountain division of the route, considering how rugged a country it traverses, has met with ground of a very favorable character, as its costs per mile will sufficiently shew, being less than that of the eastern or Potomac division, thro' Boonsborough and Hagerstown, by $7,522 per mile. This total amount exceeds by $223,545, the aggregate of the several sums at the bottom of the other columns; $100,000 of this excess being added to cover contingencies in the cost of a proposed tunnel thro' the main divide at the land patch, and $123,545 being the estimated cost of 604 miles of the 66 feet grade line, upon which the quantities could not, for want of time, be accurately ascertained.

The western division now succeeds, extending from Canoe Hollow, near Connelsville, to Pittsburg. Upon *his* division there is but a single route, the introduction of which into this report is necessary, and the description and estimate of which are given below.

The line commences at the end of the middle division, at station 1,340, on Canoe Hollow, and descends the Youhiogheny river upon its left bank, passing Connellsville 2½ miles below; thence, 8½ miles further to the Franklin iron works; thence, 17 miles more, to opposite Robb town, on the State road; thence, 14½ miles, to Elrod's riffle, 4 miles above the mouth of the river; thence, across the river and upon the right bank, to McKeesport, at its confluence with the Monongahela; thence, 14 miles further along the right bank of the latter, to the intersection of Ross and Third streets, in the city of Pittsburg, about three hundred yards above or east of the Monongahela bridge, and to the end of the western division, and of the entire route from near Harper's Ferry to the Ohio river. The limit of grade upon the western division is about 20 feet per mile, and of curvature 800 feet radius; the distance, quantities, and estimated cost of excavation and embankment, masonry and bridging, and the estimated cost of the railway laid with the plate rail of 15 pounds to the yard, are shewn in the following tabular statement of those details.

EXHIBIT C.

Of the length and cost of the Western division, extending from Canoe Hollow, near Connelsville, to the city of Pittsburg, by way of the Youhioghany and Monongahela rivers.

Distance from station 1,340 at Canoe Hollow, to the intersection of Ross and Third streets in the city of Pittsburg.	Excavation or embankment.			Bridge masonry.			Bridge superstructure.	Suport walling and culvert masonry.			Total amount.
Miles and decimals.	Cubic yds.	Price per yard.	Amount.	Perches.	Price per perch.	Amount.	Amount.	Perches.	Price per perch.	Amount.	
60.379 - - -	2,593,130	27.2	$705,035	28,246	$3.61	$102,074	$27,376	13,780	$2	$27,561	$863,612
Add for cost of 60.379 miles of single railway, at $4,600 per mile - - - - - - -											277,742
Total estimated cost of road complete with a single track - - - - - - - -											$1,141,354

Amounting to the sum of one million one hundred and forty-one *one* thousand three hundred and fifty-four dollars, being at the rate of $18,903 per mile.

The three preceeding tables, A, B, and C, of the three divisions of the route, are condensed into table D, which exhibits aggregates for the entire route, of distance, quantities of excavation and embankment, masonry and bridging, and the estimated cost of the railway laid with the plate rail of 15 pounds per yard.

EXHIBIT D.

Of the length and cost of the whole route extending from the Little Catoctin, 8½ miles below Harper's Ferry, and 37½ miles from the city block in Baltimore, to the city of Pittsburg, on the Ohio river, by way of Boonsborough, Hagerstown, Cumberland, Wills' creek, and the Casselman's, Youhiogheny, and Monongahela rivers.

Distance from the mouth of the Little Catoctin, on the B. and O. R. R. to the intersection of Ross and Third street, in the city of Pittsburg.	Embankment or excavation.			Bridge masonry.			Bridge superstructure.	Support walling and culvert masonry.			Total amount.
Miles and decimals.											
274.056 - - -	$10,671,988	$37.17	$4,270,679	144,370	$4.36	$629,364	$117,097	104,058	$1,71	$178,562	$5,420,813
Add for 274.056 miles of single railway, at $4,600 per mile - - - - - - -											1,260,655
Total estimated cost of the road completed with a single track - - - - - - -											$6,681,468

Amounting to the sum of six millions six hundred and eighty-one thousand four hundred and sixty-eight dollars, being the rate of $24,383 per mile.

Concluding Remarks.

In the preceding estimates of the cost of graduation, masonry, and bridging, no addition has been made to their nett results to provide for contingencies, the usual allowance for which is 10 per cent. upon the amount estimated; when, however, the parts composing the present estimates were brought together, and the judgments made to bear upon their grand results, it was perceived that in executing the details in detached portions, such prices had been assumed (in the desire to avoid too low an estimate) as gave too high an average for the whole. In coming to this conclusion, use was made of the statements contained in the annual report of this company, of the known actual cost of the work heretofore done upon the main stem of the Baltimore and Ohio railroad to the Point of Rocks, and upon the lateral branch to Washington; from these statements the necessary extracts are made in the annexed paper marked E. The comparison thus made between the prices *paid* with those now *estimated* for similar work, showed the latter to be the highest by 13¼ per cent. upon the graduation, and an average of about 13½ per cent. upon the masonry and bridging. Under these circumstances, it was conceived not to be necessary, nor indeed fairly allowable, to add any thing for contingencies, which were believed to be fully provided for by the excess over past actual prices, which the present estimates exhibited, inasmuch as the work already done east of Harper's Ferry, and carried on under a state of things as unfavorable as any which can reasonably be supposed to affect the future progress of the road westward of that place. It was thought at the same time not requisite to revise the present estimates, so as at the expense of much labor to reduce them in detail, merely with the view of restoring them to their present situation by the addition of the usual per centage, which may therefore be considered, as in fact, included in the nett prices here spoken of.

The distance from the City block in Baltimore, to Pittsburg by the route herein described, will be 347½ miles, over which goods can be conveyed (at a speed of eight miles per hour including stoppage) in 43½ hours, (and passengers at a speed of 15 miles per hour, also including detentions) in 23¼ hours. That these speeds can be maintained with safety and a proper regard to the road and machinery, no doubt is entertained, and the results which they promise, encourage sanguine expectations of the amount of trade and travel which will flow through this, the shortest practicable line of railway from the Atlantic seaboard to the navigable waters of the west.

All of which is respectfully submitted, by your obedient servant,

BENJ. H. LATROBE,
Engineer of Location.

True copy.
Test:

GEORGE MACKUBIN,
Treas'r. W. S. Md.

28*th Jan'y*, 1842.

Synopsis of prices paid upon the Baltimore and Ohio railroad, and its Washington branch, for graduation and masonry, compared with the estimates of work of the same kind, for the proposed extention of the Baltimore and Ohio railroad west of Harper's Ferry.

The deep cut.

Graduation 310,250 cubic yards at $39\frac{36}{100}$ cents per yard, $122,118 33
Add 2½ per cent. $98\frac{98}{100}$, actual cost $40\frac{34}{100}$ cents.
The work carried on day and night.

Gadsby's Run embankment.

Graduation, 210,106 cubic yards at $32\frac{20}{100}$ cents per yard, $65,584 35
Add 2½ per cent. $\frac{80}{100}$, actual cost 33 cents.
The work carried on day and night.

City division.

Graduation, 85,647 cubic yards at $29\frac{89}{100}$ cents [per] yards, $25,604 59
Add 2½ per cent. $\frac{75}{100}$, actual cost, $30\frac{64}{100}$ cents.
Haul for greater portion, 1320 feet. There was a loss here from suspension.

On the "first seven miles" (to Patapsco.)

Graduation, 955,303 cubic yards at $33\frac{50}{100}$ cts. per yard, $310,568 27
Add 2½ per cent. $\frac{84}{100}$, actual cost $34\frac{34}{100}$ cents.
Haul 1500 feet.

From end of first seven miles, to "Point of Rocks," and including the lateral road to Frederick.

Graduation 1,555,410 cubic yards, at $31\frac{73}{100}$ cts. per yard, $493,574 63
Add 2½ per cent. $\frac{79}{100}$, actual cost $32\frac{52}{100}$ cents, including rock haul 600 feet.

Aggregate average from Mount Clare depot to Point of Rocks and Frederick.

Graduation, 2,510,713 cubic yards, at $32\frac{3}{100}$ cts. per yard, $804,142 90
Add 2½ per cent. $\frac{80}{100}$, actual cost $32\frac{83}{100}$ cents. Haul 942 feet.

Estimated west of Harper's Ferry.

Graduation, exclusive of tunnel excavation.
10,568,281 cubic yards, at $37\frac{17}{100}$ cts. per yard, $3,927,908
103,707 yards tunnel excavation, at $4 27 per yard, $442,771

On the first six miles to second crossing of Washington road.

Masonry. Culvert masonry, 2,203 perches at $4 30 pr. p. $9,473 48½
Bridge do 23,695 do. 5 72 do. 135,830 04½

From second crossing of Washington road to Point of Rocks and Frederick.

Masonry, culvert masonry, 19,855½ perches, at $1 73 per perch,		$34,397 07
bridge masonry, 34,549½ perches, at $4 03 per perch		139,371 73½
54,405 perches at $3 20 per perch		$173,786 98

Aggregate—From Mount Clare depot, to Point of Rocks and Frederick.

Masonry, culvert masonry, 22,058½ perches at $1 99		$43,870 65½
bridge do 58,244½ do. do. 4 73		275,201 77

Washington branch.

Graduation, 1,991,352 cubic yards at 33 $\frac{37}{100}$ cts. per yard,	$664,520 08
Add 2 per cent. $\frac{67}{100}$, actual cost 34 $\frac{64}{100}$ cents, average haul, 2000 feet.	
Masonry, culvert masonry, 7,150 perches at $4 50 per perch	$32,272 02
bridge masonry, 37,756½ perches at $6 11 per perch	242,895 19

Estimated west of Harper's Ferry.

Masonry, culvert masonry, 104,058 perches, at $1 71 per perch	$178,562
bridge masonry, 144,370 perches at $5 17 per perch	$746,466
248,428 perches $3 72	$925,822

True copy.
Test: GEORGE MACKUBIN,
Treas'r. W. S. Md.

28*th Jan'y*, 1842.

STATE OF MARYLAND, *Baltimore city, sct.*

Be it remembered, that on this twenty-sixth day of September, in the year eighteen hundred and thirty-eight, before me the subscriber, a justice of the peace of said State, in and for said city, personally appeared Benjamin H. Latrobe, engineer of location and construction of the Baltimcre and Ohio railroad, and made oath on the Holy Evangely of Almighty God, that the estimate contained in the aforegoing report, shewing the cost of constructing and completing the Baltimore and Ohio railroad from the Ohio river, by way of, and through Cumberland, Hagerstown and Boonsborough, to its present track near Harper's Ferry, has been made out, after a particular and minute survey of the route of said road, by said engineer, as set forth in said report, and that said estimate is true and correct, to the best of his knowledge and belief.

BENJAMIN H. LATROBE,

Sworn before SAM'L. PURVIANCE.

ENGINEER'S OFFICE, BALTIMORE AND OHIO RAILROAD,
Baltimore, September 25th, 1838.

To LOUIS MCLANE, PRES'T.

SIR: In the preparation of the foregoing estimates by Benj'n H. Latrobe, the engineer of location and construction, of the probable cost of constructing the Baltimore and Ohio railroad, from a point on the Ohio river, by way of, and through Cumberland, Hagerstown and Boonsborough, to its present track near to Harper's Ferry, as indicated or described in the act of Assembly of Maryland, of December session 1835, chapter 395, entitled "An act for the promotion of internal improvement," I have given every proper assistance, and having carefully examined and maturely considered the same, I approve of and concur in them. The field operations detailed or referred to, in the foregoing report of Benj. H. Latrobe, were under his immediate charge, but as chief engineer of the company, I extended a general, and when necessary, a particular care and supervision over the making of the surveys and estimates by that officer and his assistants; and I believe, that these surveys and estimates have been made with fidelity, and with all the accuracy that circumstances would reasonably permit; at the same time it must be borne in mind, that in such complicated estimates it is impossible to arrive at absolute certainty; in such cases, the most that human foresight and inginuity can attain, is an approximation more or less near to the precise amount, which the actual execution of the work can alone develop. I believe, however, that the estimates now reported are entitled to be regarded with all the confidence that can reasonably attach to estimates of this character.

Respectfully submitted. J. KNIGHT, *Chief Engineer.*

True copy.
Test: GEORGE MACKUBIN,
Treas'r. W. S. Md.

28*th Jan'y*, 1842.

STATE OF MARYLAND, *Baltimore city, sct.*

Be it remembered, that on this twenty-sixth day of September, in the year eighteen hundred and thirty-eight, before me, the subscriber, a justice of the peace of the said State, in and for said city, personally appeared Jonathan Knight, chief engineer of the Baltimore and Ohio railroad, and solemnly, sincerely, and truely declared and affirmed, that the estimates referred to in the annexed communication, made by the engineer of location and construction, of the Baltimore and Ohio railroad, are just and true, to the best of his knowledge and belief.

Affirmed before J. KNIGHT,
SAML. PURVIANCE,

True copy. GEORGE MACKUBIN,
Test: *Treas'r. W. S. Md.*
28*th Jan'y*, 1842.

COUNCIL CHAMBER, ANNAPOLIS,
September 21, 1836.

I hereby certify, that it appears from documents on file, in the Executive Department of this State, that the Baltimore and Ohio Railroad Company, in general meeting assembled, have approved, assented, and agreed, to the several provisions of the act for the promotion of internal improvement, (chapter 395, of the acts of the General Assembly of December session, 1835,) so far as they are applicable to the said corporation, and on the twenty-sixth day of July last, communicated their said approval, assent, and agreement, under their corporate seal, and the signature of their president, to his excellency the Governor of Maryland.

THOMAS CULBRETH, *Clerk*
of the Executive Council.

True copy.
Test:
GEORGE MACKUBIN,
28th Jan'y, 1842. *Treas'r. W. S. Md.*

On the back of the aforegoing certificate was thus written, to wit: certificate of the clerk of the council, that the Baltimore and Ohio Railroad Co., have approved, &c., chap. 395, of 1835, and communicated their approval, &c., to the Governor, 26th July last.
Received 22*nd Sept'r*, 1836.

Subscription of the State, in virtue and pursuance of the said Act, 24 September, 1836.

STATE OF MARYLAND:
Anne Arundel county, to wit:

Be it known, that on this, the 28th day of January, 1842, personally came George Mackubin, treasurer of the Western Shore, before me, the subscriber, one of the said State's justices of the peace, in and for the said county, and made oath on the Holy Evang'ly of Almighty God, that the aforegoing writings on twenty pages, on each of which he has written his name in attestation of the fact, are true copies of [the] original, now on file in the Western Shore Treasury, whereof so much as is written, in all but the last page, is a copy of papers received into the said Treasury, on the 10th Nov'r., 1838, from the Baltimore and Ohio Railroad Company.

WILLIAM GLOVER.

ANNE ARUNDEL COUNTY, *to wit:*

I hereby certify, that William Glover, gentleman, who appears to have taken and signed the aforegoing affidavit, was, at the time of so doing, one of the State of Maryland justices of the peace, in and for Anne Arundel county, duly commissioned and sworn.

In testimony whereof, I hereunto set my name, and affix the seal
[L. S.] of Anne Arundel county court, this second day of February, in the year one thousand eight hundred and forty-two.

WM. S. GREEN, *Cl'k. A. A. co'ty court.*

It is also admitted—that the Chesapeake and Ohio Canal Company (a corporation chartered by law of the said State of Maryland) was in existance and duly organised at the passage of the said act of 1835, chapter 395, and that the said canal company did in general meeting accept, assent, and agree, to the several provisions of the said act of 1835, chapter 395, and did communicate its said assent and agreement, under its corporate seal, and the signature of its president, to the Governor of this State, in the manner and within the time prescribed by the said act; which approval, assent, and agreement were as follows:

The stockholders of the Chesapeake and Ohio Canal Company, in general meeting, July 28th, 1836.

Resolved, That the Chesapeake and Ohio Canal Company, assembled in general meeting, on the 28th day of July, 1836, does approve, assent, and agree, to the several provisions of an act of the General Assembly of Maryland, passed on the fourth day of June, 1836, entitled "an act for the promotion of internal improvement," so far as the same are applicable to this corporation; and that the president of said company be, and he is hereby, authorized and directed to communicate an attested copy of this resolution, under the corporate seal of this company, to the Governor of the State of Maryland, on or before the first day of August next.

Extract from the journal of proceedings.

Signed, PETER FORD, *Chairman.*

JOHN P. INGLE, *Secretary.*

OFFICE OF THE CHESAPEAKE AND OHIO CANAL COMPANY,
Washington, July 29th, 1836.

I, George C. Washington, president of the Chesapeake and Ohio Canal Company, do hereby certify that the foregoing is a correct copy of a resolution passed by the stockholders of the Chesapeake and Ohio Canal Company, in general meeting, on the 28th instant.

In testimony whereof, I have hereunto affixed the corporate [SEAL'S PLACE.] seal of the Chesapeake and Ohio Canal Company, this 29th day of July, 1836.

Signed, G. C. WASHINGTON,
Pres't. of Ches. and Ohio Canal Co.

Attest: JOHN P. INGLE,
Cl'k. C. and O. C. C.

STATE OF MARYLAND, *to wit:*

I, Cornelius McLean, Secretary of State, for the State of Maryland, do hereby certify, that the aforegoing is a true copy of the acceptance by the Chesapeake and Ohio Canal Company, of the act of the General Assembly of Maryland, passed on the fourth day of June, 1836, entitled "an act for the promotion of internal improvement."

In witness whereof, I have hereunto set my hand on this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and forty.

CORNELIUS McLEAN, *Sec'ty of State.*

It is also admitted, that after this suit was instituted for the purpose of recovering the said forfeiture of a million of dollars, the legislature of Maryland on the 10th day of March, 1841, passed the act of December session 1840, chapter 260, repealing the said fifth section of the said act of 1835, chapter 395, as far as relates to the said forfeiture of a million of dollars, and releasing the said defendants from the said forfeiture, and every part thereof, and directing any suit instituted to recover the same to be discontinued, and to have no effect. It is also admitted, that the said repealing act of 1840, chapter 260, was passed upon the following memorial of the said defendants to the legislature, and that at the time of passing the same there was then before the legislature a counter memorial upon the said subject from the said commissioners of Washington county, which memorial and counter memorial, it is agreed, were as follows, to wit:

To the honorable the General Assembly of Maryland.

The memorial of the Baltimore and Ohio Railroad Company, respectfully represents, that in the act of Assembly passed at the extra session of May, 1836, chap. 395, of your honorable body, there is a provision making it the duty of your memorialists, in the prosecution of their road westward from Harper's Ferry, to locate and construct it, so that it shall pass through Hagerstown and Boonsborough, under the penalty of forfeiting one million of dollars to the State of Maryland, for the use of Washington county. When the above mentioned act was passed, your memorialists did not object to this particular provision, because they were not aware of the expense and difficulties that a compliance with it would involve. The surveys from which they derive the information that they then possessed, had been confirmed to what was apparently the natural route to the west, the Valley of the Potomac, and they knew nothing that would make the construction of the road through the centre of Washington county more expensive than along its southern border. Nor was your honorable body at that time more fully informed upon the subject than your memorialists, and it may be presumed, assented to the provision in question, in the belief of the legislature, that it would benefit two flourishing towns at a cost which would not be objectionable, as regarded the other portions of the State, which were all interested in the completion of the road to the west, at the least expense, and in the shortest time.

After the act of May session, 1836, was passed, your memorialists instituted the most extensive examinations of the country west of Harper's Ferry, and among other routes surveyed and estimated,

were the route through Hagerstown and Boonsboro', and a route lying in Virginia, from Harper's Ferry, to within six miles of Cumberland, where it crossed the Potomac into Maryland. The former was the most costly of the practicable routes, and the latter was the cheapest, and in all other respects the best. The Hagerstown and Boonsboro' route was estimated to cost $5,074,757, from the point of divergence from the main stem below Harper's Ferry, to Cumberland; the Virginia route was estimated to cost with the same track, $3,023,889. To have adopted either route passing through Hagerstown and Boonsborough, would have therefore involved your memorialists in an unnecessary expense to a serious amount. Unnecessary, because the connection with the western waters could be effected without it, and it was this connection that your memorialists were created to complete. The *recources* of your memorialists consisted of the subscriptions of the States of Maryland and Virginia, and the cities of Baltimore and Wheeling, amounting to $8,360,520, every dollar of which was necessary to enable them to reach the western waters by the cheapest and shortest route; unless, therefore, an imperfect structure could be resorted to, or fresh resources could be obtained, and your memorialists did not know where to look for them, unless to the stockholders public and private, who had already so largely contributed to the undertaking, the adoption of the Hagerstown and Boonsboro' route would have destroyed the prospect of a connection with the western waters, through the agency of your memorialists. In addition to what your memorialists conceive was the necessity imposed upon them by the enormous additional expense of any other than the Virginia route, there was another consideration which by itself was sufficient to force your memorialists to adopt it. The time limited by the Virginia charter for the construction of the road in that State expired on the 4 July, 1838, and the legislature consented to prolong it for five years, only upon the express condition, that the road should be carried through the territory of the State from Harper's Ferry to a point six miles below Cumberland.

To have rejected the law of Virginia, therefore, would have been to deprive your memorialists of the power of completing the road to the point of its ultimate destination at Wheeling, to reach which point, whatever route may have been adopted east of Cumberland, it was necessary to pass through the northwestern portion of the State of Virginia.

The same law which prolonged the time for completing the road authorized a subscription of $1,058,420, to the stock of the company; a part of the resources already referred to, and this would have been lost, had the law in question not been accepted.

Under these circumstances, your memorialists did not believe that they had a right to hesitate as to the course to be pursued by them, and they adopted the route through Virginia, under the firm conviction, that to adopt any other would be a violation of their

duty that would not be justified by the fact that they had adhered to the letter of the law, and trusting to the appreciation of their course by your honorable body, to procure the remission of the penalty imposed by the act already referred to. Nor were your memorialists restrained from adopting the route through Virginia, by the belief that any injury was done to the people of Washington county thereby. It is true, that there would be one avenue less to market, than if the Hagerstown and Boonsborough route had been adopted, but then Washington county was already far more fortunate in this respect than any other county in the State.

Both the towns named in the act were on the national road, and Hancock and Williamsport, two flourishing places, were on the line of the Chesapeake and Ohio canal, the convenient avenue to market of the mills which produced the great staple of the county. Besides this, too, Hagerstown was connected with the line of Pennsylvania improvements by the Franklin railroad, and was the point of divergence from which the western travel, turning away from the commercial emporium of Maryland, sought the market of a neighbouring and rival city. Comparing the fortunate position of Washington county with that of other counties of the State, your memorialists did not perceive that they did any injury to it by the course which they pursued. If they did not add to its advantages at the expense of a million of dollars to the stockholders in the company, of which the State of Maryland was the largest, they certainly did not impair in any wise the many advantages of which the county was already the enterprising and fortunate possessor. Your memorialists entertained the hope, that the facts here stated, which were generally known, would have prevented any steps to enforce the penalty of one million of dollars, at least without some express permission of the State authorities.

But in this hope your memorialists have been disappointed, and a suit has been brought, in the name of the State of Maryland for the use of Washington county, against the Baltimore and Ohio Railroad Company, to the September term of 1840, of Baltimore county court, for one million of dollars, oblige your memorialists to apply to your honorable body for a repeal of that portion of the act of the extra session of May, 1836, chap. 395, which imposes the penalty in question.

Memorial of the Board of Commissioners of Washington county.

To the Senate and House of Delegates of the State of Maryland:

The board of commissioners of Washington county, respectfully represent, that they have seen with great surprise the memorial of the Baltimore and Ohio Railroad Company to the legislature, praying to be released from the penalty of one million of dollars which by the laws of this State, passed with the full consent of that corporation, was to be incurred by it in a certain event, and which by its

subsequent voluntary act has been forfeited for the benefit of Washington county.

The forfeiture in question grew out of the provisions of the act of 1835, chap. 395, which granted the sum of three millions to this company, and by which it was declared to be, and made, the duty of this company so to locate and construct their road as to pass through Cumberland, Hagerstown, and Boonsborough; to which, however, a proviso was added, that if the company should not locate their road in the manner directed by that act, they should forfeit a million of dollars to the State for the use of Washington county.

This act, which was passed in May, 1836, required, as a condition precedent to the payment of any part of the three millions granted by it, that the company should, in general meeting of the stockholders, approve, assent, and agree to its provisions, and should communicate such assent and agreement to the Governor of Maryland before the 1st day of August then next. And accordingly, at a general meeting held in the city of Baltimore in July, 1836, it was resolved that the company did approve, assent, and agree, to the several provisions of the act referred to; and the president was requested to forward to the Governor, before the first day of August then next, a copy of the resolution, under his own signature and the seal of the corporation; all of which was done, and the resolution is now of record in the executive chamber at Annapolis. Again, in act of 1837, chapter 314, passed at the instance of, and conferring important immunities upon, this corporation, the legislature, after re-asserting the obligation of the company to locate their work conformably to the command of the original law, declared that nothing therein contained shall be construed as releasing them from the forfeiture of one million of dollars for the use of Washington county, upon their disobedience of that command. And the company was again required to signify their acceptance of the provisions of this law, and to communicate the same to the treasurer of the Western Shore, as a condition precedent to its going into effect. This corporation seems now to consider that the General Assembly of Maryland were not in earnest in thus carefully guarding the rights of Washington county, and that these solemn acts, with their own deliberate and repeated assent to them, were a mere rabble of idle words, thrown together without aim or object or meaning in themselves, and intended to be of no effect for any purpose but to mislead and deceive a confiding and deeply interested people. This board, however, are restrained by their respect for the legislature of their own State, and their reverence for its laws, from raising or *duscussing* such a question.

The people of Washington county regard this million of dollars as damages, liquidated in their behalf by the legislature, with the consent of the parties concerned. The line of duty marked out for this company they have voluntarily, and without cause, departed

from; and now they come forward, not to make reparation for the injuries they inflicted, not even to say that the damages are too high, but that the whole treaty, with all its stipulations, and all the rights under it, shall be expunged and rendered utterly void. This board having said that the company did depart from its covenanted line of duty without any just cause, it is proper that they should state the facts upon which this allegation is founded. In the twelfth annual report of the railroad company, dated December 13th, 1838, it is said that the president, with a committee of the directors and the chief engineer, attended the preceding session of the Virginia legislature, to urge upon that body the application for a renewal of the charter within the Commonwealth, which would expire in the month of July, 1838. That a law was finally passed, extending the time for completing the work five years; but it deprived the company of the option of selecting between the routes in the State of Maryland, and those in the State of Virginia between Harper's Ferry and Cumberland, and made it an express condition that the road should pass into Virginia at Harper's Ferry, be thence constructed through that State to about five miles and a half below Cumberland, and that Wheeling should be one of the termini. The law also authorised an additional subscription of $1,058,420 on the part of the State; it is also stated in the same report, that the difference in the cost of construction, in favor of the Virginia route, "in actual and equivalent capital," would be $4,983,420.

From all which considerations, it appears that the excuse offered by the company for violating their own contract, a law of their own State, and the just hopes of a large body of their own citizens, is, that they were commanded to do so by the legislature of Virginia; and moreover, that they were not only so commanded by the aforesaid legislature of Virginia, but were amply indemnified against all the consequences of such violation, by an actual subscription to their work of $1,058,420, and by the presentation of a route beyond the limits of their own State, possessing advantages over any within it "in actual equivalent capital," of $4,938,420. If the company, in making these statements, had been reasoning professedly against the release of this forfeiture, this board would have considered that they had made a very strong case.

It is however extremely difficult to comprehend how this difference of $4,983,420, "in actual and equivalent capital," or of $2,083,917, "in actual outlay in money," as stated under another view in the same report, should exist in point of fact between the two routes. And this difficulty will be found to be greatly enhanced by a reference to other documents emanating from the same company. In the report of the engineer of location, appended to the tenth annual report of the company, the surveys and estimates of three different routes, each passing from Harper's Ferry through the heart of Washington county, and coming out upon the Potomac at the gorge of the North mountain, are presented in detail. In re-

ference to the first of these, which is termed the Western or Pleasant Valley route, it is stated distinctly that it is found to be "quite practicable, is direct in its general course, and without curves of a shorter radius than one thousand feet;" of the second route the engineer remarks, that the whole distance by it, from Harper's Ferry to the narrows of the North mountain, is thirty-six miles, being seven miles shorter than the first, and then, it is added, "that a considerable superiority, in respect to grade, would belong to the river route, upon which it would not be necessary to employ a more rapid rate of ascent *then* twenty-five feet per mile, excepting, perhaps, in ascending from the Antietem to the Salisbury ridge summit, where fifty feet per mile might be required for perhaps three miles."

A third route is also presented, which, passing on the Virginia side to a point opposite the mouth of the Antietem, then crosses the river, and pursues the valley of that stream in its direction towards Hagerstown. And to this route the engineer seems to give the decided preference. Now, in turning to the ninth annual report of this company, we find the survey and estimates of a route from a point on the Potomac, between Harper's Ferry, passing through Pleasant Valley, by Boonsborough and Hagerstown to Chambersburg in Pennsylvania. It must be here remarked, that the portion of this latter survey which lies in Maryland, passes over the most difficult and expensive ground encountered in either of the other routes above mentioned. And of the whole survey to Chambersburg, the engineer says: "The entire distance was about forty-five miles, the greater portion of which was found to be extremely favorable, and the average cost per mile, for a single track, was estimated at $10,000."

This board would here most respectfully ask the attention of the legislature to these statements of the company's own agents. If the whole distance from Harper's Ferry to the gorge of the North mountain be but thirty-six miles, and if it be true that a single track, upon the most difficult and expensive portion of that distance, would cost but $10,000 per mile, a double track would not, it is supposed, more than double that cost; and the whole work, if these estimates are to be relied upon, would cost but $720,000; and in further proof that this is not an over-estimate, it is only necessary to refer to the bill now pending before your honorable bodies, which declares that a road be made sometime hereafter from the main stem to Hagerstown, not the least costly moiety of the whole route in question, "provided the said lateral or branch road can be constructed *at a cost not exceeding* $350,000, including damages for the right of way." It is in the face of these facts that we are gravely informed that the sum which the company must sacrifice by pursuing the Maryland route, "in actual outlay in money," would be $2,083,917, and that the loss, "in actual and equivalent capital," would be the precise sum of $4,983,420. If we take the first amount, and distribute it along the whole thirty-six miles, it will give to

each mile an excess of costs over the same discription of railroad in Virginia of $56,322 30, while, by the latter mode of computation, an improvement in Maryland is compelled to suffer the disparaging excess of $138,428 per mile. It is believed, therefore, that some great mistake must have found its way into the calculations of the company, it being apparent that the whole work, either upon the Maryland or Virginia location, could not cost, "in actual outlay in money," one-half the sum which is assigned as the difference between the two, to say nothing of the cost "in actual and equivalent capital." The description of country, the undulation of surface, the character of the soil, the cost of excavation and embankment in the two States are the same; and it is deemed *violently* presumptive that a mile of road would cost neither more or less in the one State than in the other. The excess, therefore, of the cost of the Maryland route, would be shewn at once by the amount of its greater distance. What this difference may be the company have no where stated, and this board have not the means of ascertaining precisely, but believe that it cannot exceed seven miles. This board cannot well understand why the city of Wheeling should refuse to become the western terminus of this magnificent work, merely because of a slight deflection either to the right or the left, in a distant, and to her immaterial portion of its line. Nor can they comprehend wherefore the legislature of Virginia, having given the right of way without stint in the original law, should have insisted, in the supplement, upon conditions which might defeat the whole enterprise, if it were not known beforehand that the officers of the corporation, who, it seems, were present when the law passed, would have no insurmountable objections to being bound up by such restrictions. The compact between the State of Pennsylvania and this company, a history of which is given in its tenth annual report, furnishes a rational index to the mind of those under whose counsels the Virginia route has been adopted. It was there agreed upon that Maryland should have the privilege of tapping at Columbia, on the Susquehanna, the vast improvements of Pennsylvania, on the one part, and that a railroad from Pennsylvania should be permitted to form a junction with the main stem of the Baltimore and Ohio Railroad, at some point in Washington county, at or near Hagerstown or Williamsport; on the other, Baltimore made her own contract—stipulated for her own terms; the railroad company gave its consent in ample form, and the State became a party to the compact by the act of 1835, chapter 340. Immediately afterwards the tide water canal was projected, and with all convenient speed hastened to completion, and Baltimore is at this moment in the enjoyment of all its rich benefits. In due time the Franklin railroad finds its way into Washington county, and is brought to Hagerstown, when lo! the Baltimore and Ohio Railroad is to be found nowhere in that vicinity, nor in the State of Maryland at all; but has been carried by a sweep of ninety into the in-

terior of Virginia, at the safe distance of eighteen miles from the contemplated point of junction with the Pennsylvania work. It is by this species of diplomacy that the interests and the hopes of Washington county have been sacrificed; it is thus that she has been cast by Baltimore, as a new item on the debit side in adjusting the balance-sheet of trade and travel with the rival city of Philadelphia, so often and portentiously alluded to in the reports and memorials of this company. As often, therefore, as they shall be doomed to hear from that quarter the cry of alarm at any possible contact between their great work and the rival improvements of Pennsylvania, this board can but repeat the simple fact, "you agreed to the connexion, and have already received, in good faith from Pennsylvania, your own stipulated equivalent."

This board, anxious from the first for an adjustment of this controversy, applied to the company to know upon what terms, if at all, it could be settled. Their first proposition was met by a refusal, and to their second communication, which was intended to open the way for a compromise upon fair and even generous terms, they received no answer whatever. The people of Washington county ask nothing, as they would accept of nothing, as a gratuity at the hands of this corporation. If they have no cause of action which they can stand upon in a court of law, they do not desire a recovery; if they have a good legal ground of action, they appeal to that alone as giving them an indisputable claim to the sanction, and even respect, of the legislature. Under these views of their position, and of their duty to those whom they represent, this board employed counsel, by whom suit was brought in Baltimore, which however, upon further reflection, was ordered to be stricken off, and a new action instituted in Frederick county court, which is still pending. The people of this county would ask nothing more from the justice or munificence of the legislature than to give her back her "national road, stretching as it does for fifty miles through the heart of her territory, and studded as it is with thriving villages and valuable improvements all the way. Save these from the blight of depreciation and ruin, which awaits them the moment the railroad shall cross the same turnpike at Cumberland, and this board would ask for nothing more. Restore these great advantages to her citizens, heretofore their pride and boast, and then offer them a million of dollars to see themselves cut off from all means of communication with either east or west, unless by a trudge of eighteen miles into Virginia to get upon a railroad—to see their business connexions, and their long cherished social attachments with Baltimore surrendered at a blow, and themselves thrown into new fellowships among strangers, and she would regard it as no indemnity for such sacrifices.

Under these circumstances the people of this county derive but little consolation from the reflection that this magnificent railroad, which has been thus made to them the cause of incalculable mischief, is a work projected by their own friends, and paid for in part

by their own money. And when that work shall hereafter become, as by chance it may, a dead weight upon the resources of the State, it will not lighten the burthen thereof to them or their descendants to know, that they must be taxed to sustain the means of their own ruin.

This board have, in conclusion, only to add, that if the legislature shall regard the one million of dollars as a penalty inserted in the laws referred to for the purpose of covering, as in a bond, the damages actually sustained, this board will acquiesce in such construction, and submit with cheerfulness to such mode of ascertaining the damages as the legislature may appoint. Whether it be done by commissioners appointed by the legislature for the purpose, or by a jury of Frederick county, where the suit is now pending, empowered to take the whole case into consideration, and say what sum under all the circumstances is due, they will be content, and if they get not a dollar, never murmur at the issue. And this board willing now, as heretofore, to do what is just and even generous in this matter, agree also that the sum received shall be secured by the bonds of the company, without interest, until their work is completed to Cumberland, and payable afterwards in such easy instalments as shall cause no interference with any claim which the State may have upon the resources of the company. In this event this board say for themselves, and those they represent, that they desire no branch or lateral road connecting them with the main stem of the Baltimore and Ohio Railroad.

By order of the board.

ROBERT FOWLER, *Pres't.*

It is further admitted and agreed, that the several acts of Assembly herein particularly referred to, as well as any other acts or resolutions of the General Assembly of Maryland, that either party may deem applicable in the argument of this case, either in the county court, or court of appeals, or Supreme Court of the United States, should the case be hereafter carried by either party to said courts, or either of them, shall be read from the printed statute books, and have the same effect and operation in the case, as if duly authenticated copies thereof were made a part of *this* statements.

It is further agreed that all errors of pleading and of form in any part of the proceedings of either party in this case are waived; it being the object and understanding of the parties that the matters of right in controversy between them shall be fairly and fully presented to all or either of the said courts, in which the same may be pending, and that either of the said parties shall have his pleading and proceedings considered as being as perfect as they could be made to give him the benefit of the case here stated. It is admitted that this suit was the only suit ever brought by the said commissioners, or at their instance, to recover the said forfeiture of a million of dollars, and was pending when the said act of 1835, chap. 395, was passed. Upon this statement it is further agreed that, if the court shall be of

opinion that this action could not be maintained if the said repealing act of 1840, chapter 260, had not been passed, or that the operation and effect of that repealing act is to release the said forfeiture of a million of dollars, and to discontinue and put an end to this suit, then judgment to be entered for the defendants, otherwise such judgment is to be entered for the plaintiffs as the court may think right and proper. It is further agreed that the county court shall enter judgment *pro forma* for the defendants. The plaintiff to have the same right to take up the case, by appeal or writ of error, to the court of appeals, or ultimately to the Supreme Court of the United States, as if the judgment in the county court had been rendered upon demurrer, or upon a bill of exceptions taken in due and legal form upon the facts herein before agreed upon.

WM. PRICE, *for Plffs.*
FRED'K A. SCHLEY, *for Defts.*

Whereupon, all and singular the premises being seen, heard, and by the court here fully understood, for that it appears to the court here that the said plaintiff is not entitled to recover in the plea aforesaid—

Therefore it is considered by the court here that the said plaintiff take nothing by his writ and declaration aforesaid, but be in mercy for his false clamour thereupon, and that the said defendant go thereof without day, &c. It is also considered by the court here, that the said defendant recover against the said plaintiff the sum of sixteen dollars and twenty-four and two-third cents, by the court now here adjudged unto the said defendant, for its costs and charges by it about its defence in this behalf laid out and expended, and that the said defendant have thereof execution, &c.

And thereupon the said State, by its attorneys aforesaid, prays an appeal from the judgment aforesaid, so as aforesaid rendered, to the high court of appeals of the State of Maryland, and it is granted them. It is therefore ordered by the said court here that the record and proceedings aforesaid, in the plea aforesaid, with all things thereunto relating, be transmitted to the said high court of appeals for the Western Shore of the said State; and the same are transmitted to the said court accordingly.

Test: HENRY SCHLEY, *Clk.*

Memorandum.

Judgment was rendered in this case for the defendant, on the 8th day of March, 1842.

Plaintiff's costs	$8 97½
Defendant's costs	16 24⅔

MARYLAND, *sc:*

I hereby certify, that the aforegoing is truly taken from the record of proceedings of Frederick county court.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of Frederick county court, this 30th day of May, 1842.

[L. S.]

HENRY SCHLEY,
Clerk Frederick county court.

And now come into the court of appeals here, as well the said the State of Maryland, at the instance and for the use of Washington county, by Jervis Spencer and William Price, esquires, her attorneys, as the said the Baltimore and Ohio Railroad Company, by John Nelson, Frederick A. Schley, and Reverdy Johnson, esquires, her attorneys; and thereupon, on motion of the said the Baltimore and Ohio Railroad Company, by their attorneys aforesaid, it is ruled by the court here, that the said the State of Maryland, at, &c., assign the errors in the record of proceedings aforesaid, or in the giving the judgment aforesaid, so as aforesaid brought before the court of appeals here for correcting the errors supposed to be therein, or judgment by the court of appeals here will be entered against her in default thereof. And the said the State of Maryland, at, &c., by her attorneys aforesaid, says, that in the record of proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit: that by the record aforesaid it appears that the judgment aforesaid, in the plea aforesaid given, was given for the said the Baltimore and Ohio Railroad Company against the said the State of Maryland, at, &c., when, by the law of the land, that judgment ought to have been given for the said the State of Maryland, at, &c., against the said the Baltimore and Ohio Railroad Company; therefore in that there is manifest error, and she prays that the judgment aforesaid for that error, and others being in the record of proceedings aforesaid, may be reversed, annulled, and held entirely as void, and that she, the said the State of Maryland, at, &c., may be restored to all things which she lost by occasion of the said judgment, and that the said the Baltimore and Ohio Railroad Company may rejoin to the errors aforesaid, and so forth. And thereupon it is ruled by the court of appeals here, that the said the Baltimore and Ohio Railroad Company join in the errors by the said the State of Maryland, at, &c., above assigned in the record of proceedings aforesaid, or judgment by the court of appeals here will be rendered against her in default thereof. And the said the Baltimore and Ohio Railroad Company, by her attorneys aforesaid, prays that a day may be given to her to join in the error by the said the State of Maryland, at, &c., above assigned in the record of proceedings, aforesaid, until the first Monday in December next, and to her it is granted; the same day is also given to the said the State of Maryland, at, &c.

At which said first Monday in December, being the fifth day of the said month, in the year of our Lord one thousand eight hundred and forty-two, which said day was given to the said the Baltimore

and Ohio Railroad Company to join in the errors by the said the State of Maryland, at, &c., above assigned, come again into the court of appeals here the parties aforesaid, by their attorneys aforesaid; and John Sergeant, esquire, also attorney for the said State, &c., and the said the Baltimore and Ohio Railroad Company, by her attorneys aforesaid, says there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid, and she prays that the court of appeals here will proceed to the examination, as well of the record of proceedings aforesaid, as of the matters aforesaid, by the said the State of Maryland, at, &c., above for error assigned, and that the said judgment may be in all things affirmed, and so forth. Whereupon, as well the record and proceedings aforesaid, and the judgment given in form aforesaid as the matters aforesaid, by the said the State of Maryland, at, &c., above for error assigned being seen, and by the court of appeals here fully understood, and mature deliberation thereupon had: for that it appears to the court of appeals here that there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid. Therefore, it is considered by the court of appeals here that the judgment aforesaid, given in form aforesaid, be in all things affirmed, and stand in full force and effect, the said causes for error above assigned and alleged in anywise notwithstanding.

Memorandum.

Judgment was affirmed on the 26th day of January, 1843. Appellee's costs $93 47. The honorable John Buchanan, chief judge, withdrew from the argument of this cause.

Test: R. W. GILL, *Clerk.*

Afterwards, to wit, on the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and forty-three, the aforesaid the State of Maryland, at the instance, and for the use of Washington county, by her attorneys aforesaid, produce to the court of appeals here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings of the judgment last aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States; which said writ of error is as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the court of appeals for the Western Shore of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of ap-
[L. S.] peals before you, or some of you, between the State of Maryland, for the use of Washington county, plaintiff in error, and the President and Directors of the Baltimore and Ohio

Railroad Company, defendants in error, a manifest error hath happened, to the great damage of the said State of Maryland, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in January next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of our Supreme Court, the second Monday in January, in the year of our Lord one thousand eight hundred and forty-three.

Issued 1 May, 1843.

THO. SPICER,
Clk. circ't ct.

In pursuance whereof, and according to the form and effect of the act of the Congress of the United States in such case made and provided, a transcript of the record and proceedings of the judgment last aforesaid so as aforesaid rendered, with all things concerning the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

Test: R. W. GILL, *Clerk.*

MARYLAND, *sct.*

I, Richard W. Gill, clerk of the court of appeals for the Western Shore of Maryland, do hereby certify that the aforegoing is truly taken from the record of proceedings of the court of appeals of the State of Maryland for the Western Shore of said State.

In testimony whereof, I have hereto set my hand as clerk, [L. S.] and affixed the seal of the said court, the 22d day of September, A. D. 1843.

R. W. GILL, *Clerk.*

THE STATE OF MARYLAND, use of Washington county
vs.
THE BALTIMORE AND OHIO RAILROAD CO.
} Appeal from Frederick county court.

This is an action of debt instituted in the name *of the name* of the State of Maryland, for the use of Washington county, to recover the sum of one million of dollars claimed by the said county from the Baltimore and Ohio Railroad Company for an alleged violation of contract contained in one of the provisions of its char-

ter. In bar of any recovery in this suit, the appellee has pleaded that nothing is due to the county, and also the act of assembly annulling the obligation and releasing the forfeiture in virtue of which the said sum of money is alleged to be due. The controversy between the parties is one of considerable magnitude, not only as regards the sum involved in the litigation, but on account of the aspect it has assumed, as a question involving grave considerations of constitutional law. The case has been argued with great legal learning and ability by the distinguished counsel employed to advocate the cause of the respective parties, and the court have derived no small degree of assistance in coming to the result at which they have arrived from the light which has been shed upon the subject in the course of the discussion. On the part of the appellant, it has been treated in the course of the argument as a clear case of contract, covered by a constitutional sanction, and therefore inviolable by legislative interference; on that of the appellee, it has, with a confidence, seemingly, and no doubt really equally sincere, been treated as a clear case of penalty, and therefore subject to legislative controul, and free from constitutional difficulty. We have considered with that care and attention which the importance of the subject demanded, the arguments which have been urged on both sides of the question, and have come to the conclusion that according to the true construction of the act of the legislature, from which the controversy has arisen, it is not a case of contract, the obligation of which has been impaired by legislative interference, but a case of penalty, and therefore subject, as to its enforcement, to the will and pleasure of the legislature.

It is a rule in the exposition of statutes, that the will of the legislature is to be regarded, and to be carried into effect, so far as they keep within the limits prescribed to them by the Constitution or fundamental law; and in ascertaining such will or intention the well established rule is "that if divers statutes relate to the same thing, they ought to be all taken into consideration, in construing any one of them." For this principle, see 6 Bacon's Abr. page 382, and so far has this rule been carried, that it is held to apply, although one of them may have expired. For which doctrine see also the same book, page 383, where it is said "it is a rule in the construction of statutes, that all which relates to the same subject, notwithstanding some of them may be expired, or are not referred to, must be taken to be one system and construed consistently." Adopting this rule in the case now before this court, as a legitimate test or standard by which to indicate the legislative mind, and we think the inference will be found to be well warranted, that the duty imposed upon the appellee of locating the road through Cumberland, Hagerstown, and Boonsborough was intended to be enforced, not by the obligation of contract, but by the sanction of penalty alone. The language of 5th section of the act of 1835, ch. 395, is as follows: "and it is hereby declared to be and

made the duty of the said company to, and they shall so, locate and construct the said road as to pass through each of said places; *provided*, that if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this act, then and in that case they shall forfeit one million of dollars to the State of Maryland for the use of Washington county." It is another well settled rule in the construction of a statute that the words are to be taken "in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense." 1 Kent's Com., page 462. Applying these principles of interpretation to the case before us, and we think the conclusion is well warranted, that penalty and not contract was in the contemplation of the legislature when they enacted the fifth section of the act of 1835, upon which this suit has been instituted. In case of non-compliance with the requirements of the law, the company is to forfeit one million of dollars to the State for the use of Washington county. The term forfeit in common parlance strongly implies penalty, and such appears to be the import ascribed to it by lexicographers of the highest respectability in giving with precision and accuracy the meaning of our language. Mr. Webster defines the word forfeit to be that which is forfeited or lost by neglect of duty, or in other words a fine, a mulct, a penalty. The language moreover is not that of convention or contract, but is mandatory in its character. It is the language of the creator to the creature, enjoining a duty to be performed, and imposing a penalty or forfeiture for disobedience or neglect. It is therefore, we think, in every view and aspect under which it can be considered, penal and not conventional, according to its sound and true interpretation. In this sense it appears to have been understood by the legislature when they passed the act of 1840, ch. 260. In that act they say "that so much of the 5th section of the act of 1835 as makes it the duty of the Baltimore and Ohio Railroad Company to construct the said road so as to pass through Hagerstown and Boonsborough be and the same is hereby repealed; and that the forfeiture of one million of dollars reserved to the State of Maryland as a penalty, in case the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in that act, be and the same is hereby remitted and released, and any suit instituted to recover the same sum of one million of dollars, or any part thereof, *he* and the same is hereby declared to be discontinued and of no effect." In this law the forfeiture to the State is emphatically termed a penalty imposed for not locating the road as prescribed by the act of 1835, and although the right of expounding laws belongs to a different department of the Government, and is not embraced within the sphere of the legislative power, still the sense of the legislature upon the subject of laws enacted by themselves, when of doubtful import, is a circumstance not, we think, entirely to be dis-

regarded. In speaking of the rule that several acts in pari materia, and relating to the same subject, are to be taken together and construed as one system, Chancellor Kent says: "The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." See 1 Kent's Com. 463, 464. Much stress was laid in the course of the argument upon the first section of the act of 1835, which requires the assent of the company to the provisions of that law as indicating that the fifth section should be construed to operate as contract and not as penalty; the term assent mentioned in that section it was said is a word *peculiarly* appropriate to contract, and not to penalty or forfeiture. This is certainly true as a general proposition, and need not be controverted to elude or avoid the force of the argument upon the present occasion. The assent of the company was essential to give to the law a binding and obligatory force, the principle being well settled that an act or charter of incorporation is nothing more than an offer until consummated by acceptance, and in that sense and for that purpose it was manifestly used in the first section of the act. It was assented to in that sense alone which it ought to receive, according to its sound and genuine interpretation; and to give to the term a different import would be a perversion of the purpose for which it was adopted. As a further proof that the fifth section ought to be construed as creating a penalty and not contract, it may be useful to refer to the ninth section of the same act, where the language of contract is clearly and unequivocally adopted. The terms there used are peculiarly appropriate for that purpose, and are so expressive or significative of that intent, as to leave not a shadow of doubt upon the subject. The expressions there used —"stipulate, agree, and bind the said company," speak a language too explicit to be misunderstood, and remove every shadow of doubt as to the intent. Nor is this the only instance in which the legislature have spoken an unequivocal language, when they intended to bind the company by the solemnities or obligation of contract. In the third section of the act of eighteen hundred and twenty-seven, chapter one hundred and four, expressions of similar import are carefully used to create the obligations of contract, instead of penalty; and that too in relation to the same subject as the one embraced by the fifth section of the act of eighteen hundred and thirty-five, out of which this controversy has arisen; and if it was designed to deal with the company in the same manner, and to impose upon them the same duties and obligations to be fulfilled under a similar responsibility in the 5th section of the act of 1835, it is difficult to conceive, why the appropriate language to execute that intent was abandoned, and terms of more equivocal import adopted.

In the third section above referred to, after specifying certain

conditions upon the performance of which the treasurer *shoud* be authorize[d] to subscribe on behalf of that State, the legislature insert the following proviso: "And provided, also, that the president and directors of the said company shall agree so to locate said road that it shall go to, or strike, the Potomac river at some point between the mouth of the Monocacy river and the town of Cumberland, in Allegany county, and that it shall go into Frederick, Washington and Allegany countys; and provided, also, before such subscription is made, the president and directors of the said company shall, in writing, to be approved by the attorney general, bind the said company to allow the State to subscribe for the remaining five thousand shares on the same terms, at any time during the session of the next General Assembly." Here it is not made the duty of the company to locate the road in a particular direction, under a forfeiture for non-performance or neglect, as in the 5th section of the act of 1835, but in the language of contract they are made to agree so to locate it that it shall go into Frederick, Washington, and Allegany counties; and in reference to the State's right of future subscription, it is still more apparent with what anxious solicitude the solemnities and binding efficacy of contract are preserved in the same section. Upon that subject the company was to be bound by a written instrument, which was not to be deemed satisfactory until it had received the sanction of the law officer of the State. It is, moreover, to be observed, that when at a subsequent period it was found necessary, in consequence of a conflict of route with the canal company, to release conditionally the railroad company from their contract, as entered into by the act of eighteen hundred and twenty-seven, the law by which they were discharged holds the same language, and speaks of it as a condition or agreement from which they were released.

If, then, the duty imposed by the fifth section of the act of eighteen hundred and thirty-five was intended to be enforced by penalty, and not by contract, the next question to be considered is, were the legislature competent to release the penalty in the manner they have done by the act of eighteen hundred and forty, chapter two hundred and sixty? In the exercise of such a jurisdiction the legislature are restrained by no constitutional prohibition; the releasing act could not be deemed an ex post facto law, in the sense of the Constitution, nor could it be considered as impairing the obligation of a contract; indeed it was not attempted to be impugned upon either of these grounds in the course of the argument, but was exclusively assailed upon the ground that the act of 1835 provided for a case of contract and not penalty, and that therefore the act of 1840 was a violation of the constitutional inhibition forbiding the State legislatures from passing any law impairing the obligation of contracts. The money being forfeited to the State as a penalty, for the use of Washington county, one of the constituent elements of the State, the legislature had an unquestionable right

to remit it. Washington county is an integral part of the State, or portion of the body politic, and the money, if received by her, would belong to her as public property in her public political capacity, to be applied exclusively to the public use; as a county she stands to the State in the relation of a child to a parent, subject, in all respects, to its jurisdiction and power, as well as entitled to the benefit of its fostering care and protection; as a member of the political family she has a right to participate in the legislative councils of the country, but the will of the majority, when expressed according to the forms of the Constitution, is binding and obligatory upon her, and to that will, as the rule of her conduct, she is bound to submit with becoming deference and respect. Several instances were referred to in the course of the argument, where it appears that a similar jurisdiction has been exercised by some of our sister States; but it is deemed unnecessary more particularly to refer to them. If, then, the act of eighteen hundred and forty, releasing the penalty, was a legitimate exercise of power, and it was within the constitutional competency of the legislature to pass it, what was the effect of that law upon the rights of the plaintiff as to the further prosecution of her suit, and *and* did it operate to bar the recovery of the penalty which was remitted by it? Before that part of the case we think no doubt can be entertained, as all the authorities referred to seem to speak one uniform language upon the subject; they all agree that no penalty, incurred during the continuance of a law, can be enforced after its experation or repeal, without a saving clause, or some special provision to that effect. In 1st Kent's Com., page 465, the principle is stated to be that "if an act be penal and temporary, by the terms or nature of it, the party offending must be prosecuted and punished before the act expires or be repealed. Though the offence be committed before the expiration of the act, the party cannot be punished after it has expired, unless a particular provision be made by law for the purpose." To the same effect, see 5 Cranch, 283, where Chief Justice Marshall, in delivering the opinion of the court, says: "The court is therefore of opinion that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has been long settled on general principles, that after the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force; unless some special provision be made for that purpose by statute." Many other authorities might be referred to in support of the same principle, but the rule seems to be so well settled that it is deemed unnecessary to do so. If this therefore is to be deemed a case of penalty, and not one of contract, the act of eighteen hundred and forty seems to operate as a complete bar to the plaintiff's recovery, and the judgment of the court below ought to be affirmed. But supposing that the views heretofore expressed upon the merits of this controversy are well founded; and that it

is to be deemed a case of contract and not of penalty, is it a contract coming within the purview of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts, and was the act of 1840 therefore a nullity? In order to arrive at a just conclusion upon that subject, it is material to consider who are the contracting parties, and in what relation does the cestui qui use stand to the legal plaintiff upon the record? The contracting parties are the State on the one part, and the Railroad Company on the other. The consideration of the contract were the franchises and privileges derived by the company from the State, and the cestui qui use is one of the counties of the State, claiming an interest incidentally in her political character and capacity, in virtue of one of the provisions contained in that contract. The State, for reasons which she deemed sufficient, has thought proper by an act of her legislature to annul the contract, and release the claim of the cestui qui use which this action has been instituted to enforce, and it is now contended on the part of the appellant in support of it, that such legislative act is a nullity, because it violates that great moral sanction of the Constitution, which declares that no State shall pass any law which impairs the obligation of contracts. To declare an act of a co-ordinate department of the government an unwarrantable assumption or usurpation of power, because it is a violation of a constitutional prohibition, is an exercise of the judicial office of a grave and delicate nature, which never can be warranted but in a clear case, but however painful and unpleasant the task may be, it is a duty enjoined upon the courts of justice sometimes, to execute it under the solemn sanctions of an oath, which they are not at liberty to overlook or disregard. In the case, however, which we now have to decide, we have no such duty to perform, because we think the legislature have not transcended their constitutional limits in passing the act of eighteen hundred and forty, by which they released the claim of the plaintiff, and discontinued the action which was brought to enforce it. Washington county, by which the claim is attempted to be enforced, is one of the public territorial divisions of the State, established for public political purposes, connected with the administration of the government. In that character, she would receive the money as public property to be used for public purposes only, and not for the use of her citizens in their private and individual characters and capacities. In that relation they would have no immediate interest, and could assert no title. She is one of the instruments of the government, invested with a local jurisdiction to aid in the administration of public affairs, and may be emphatically termed a part of the State itself. If then it be public and not private property, it would seem to be completely at the disposal of the government, and the act of eighteen hundred and forty was nothing more than a rightful exercise of legislative power. In the forty-fourth number of the Federalist, a work of distinguished

merit and ability, written principally by two emenent members of that convention of enlightened men by whom the Constitution of the United States was formed, Mr. Madison, speaking of that principle contained in it which prohibits the States from passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts, uses the following language, as indicating his understanding of the views of the convention when they adopted that prohibitory clause of the Constitution. "The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional
against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights." In 2 Dallas, page 320, Judge Patterson, who was also a member of the convention by which the Constitution was formed, speaking of the import of the same constitutional restriction upon State legislative power, expresses himself in the following terms: "Over public property they have a disposing and controling power—over private property they have none, except perhaps in certain cases, and those under restrictions; and except also what may arrise from the enactment and operation of general laws respecting property, which will affect themselves as well as their constituents." In 2 Kent's Com., page 275, Chancellor Kent says: "Public corporations are such as are created by the Government for political purposes, as counties, cities, towns, and villages, and the whole interest in them belongs to the public." In the Dartmouth College case, the chief justice, in delivering the opinion of the court, observed, "that the provision in the Constitution never had been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. Dartmouth College was a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with Government, and its funds were bestowed by individuals on the faith of the charter, and those funds consisted entirely of private donations. The corporation was not invested with any portion of political power, nor did it partake in any degree in the administration of civil government." A contract of that kind he held to be within the purview and protection of the Constitution. In 9 Cranch, page 52, Mr. Justice Story, in delivering the opinion of the court, says: "In respect also to public corporations, which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing however the property for the uses of those for whom, and at whose expence, it was originally purchased." In 9 Gill and Johnson's Rep., page 401, this court express themselves to the same effect, where they say: "Public corporations are

to be governed according to the laws of the land, and the Government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises, that is, of the essence of a public corporation." Again, in page 397 of the same book, it is said: "A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the Government, subject to the control of the legislature, and its members officers of the Government, for the administration or discharge of public duties, as in the cases of cities, towns, &c. In 1804, the justices of the levy courts of the respective counties were incorporated, and all property belonging to any county, or appropriated to any county use or purpose, was vested in them for the benefit of the county; and by an act passed in 1829, ch. 21, commissioners are directed to be chosen biennially by the votes of the county of Washington, who are likewise incorporated, and in whom the same powers and privileges are vested as were given to the justices of the levy courts by the act of 1804, and all property belonging to the county, or appropriated to its use, is in like manner vested in the said commissioners.

The money, then, for which this suit has been brought, if recovered, would be vested in this body corporate as a public corporation for public or county purposes, and would not be private property belonging to the citizens of the county in their individual rights or private capacities. It would be held by the commissioners as public property, given by the State to be used only under legislative authority for public purposes, and be subject in their hands, in all respects whatsoever, to the controlling power and jurisdiction of the legislature. It is a circumstance moreover worthy of consideration, as indicating the public character of these commissioners, and the official relation in which they stand to the government as public agents, that the act of incorporation provides that, in case of death, resignation, refusal to act, or removal from the county, the vacancy so occasioned shall be filled by the executive of the State until a new election shall take place. To put the question in a still stronger light, let it be supposed, for the sake of the argument, that the one million of dollars had been appropriated as a forfeiture to the use of the Eastern Shore of Maryland, one of the two great divisions of the body politic, could it be contended, with any semblance of reason or propriety, that a remission of the penalty by the State, would not be a legitimate exercise of legislative power; or to put the question in a still clearer point of view, suppose the money had been appropriated to the use and benefit of all the counties of the State, designating each of them by their respective names, which would be substantially to the use of the State, could it be successfully maintained, that the government, if the public good required it, would have no right to remit the for-